(29,508)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 958.

GEORGE F. SHAFER, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN *ET AL.*, AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, APPELLANTS,

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, BERWICK FARMERS GRAIN COMPANY, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

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1 **In District Court of the United States, District of North Dakota, Southeastern Division.**

Caption.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR Company of Wimbledon, Berwick Farmers Grain Company, Grandin Farmers Grain Company, Hampden Farmers Elevator Company, Walhalla Cooperative Elevator Company, Glenfield Cooperative Association, Farmers Cooperative Elevator Company of Cando, Benedict Farmers Cooperative Elevator Company, Farmers Elevator & Mercantile Company of Rogers, Cayuga Farmers Elevator Company, Lybeck Grain Company, I. L. Berge Elevator Company, Regan & Lynnes Elevator Company, Kensal Farmers Elevator Company, Chamley Bros. Grain Company, Gwinner Farmers Grain Company, Freeborn Elevator Company, Hazen Grain Company, Eldridge Farmers Elevator Company, Carrington Grain Company, Pingree Grain Company, Farmers Grain Company, Cargill Elevator Company, Occident Elevator Company, corporations organized and existing under and by virtue of the laws of the State of North Dakota; W. M. Noddings, doing business as the Noddings Grain Company; L. L. Kruchten, doing business as the Perth Elevator Company; J. C. Smith, doing business as Alexander Grain Company; F. M. Cook, doing business as the Woodworth Grain Company; John A. Aird, Alexander Marchanke, doing business as the Independent Elevator Company; Robert Fleming, James Whelan, Pierce Blewett, doing business as the Star Elevator Company; Hans Neilson, doing business as the Elk Valley Farms Company; E. H. Ray, Arnold Bros., C. H. Sheldon, Louis Gjere, doing business as the Cando Grain Company; Schilling & Kruger, O. B. Sorenson, V. W. Steele, doing business as Jud Elevator Company; John Southall, J. A. Frank, H. C. Sorenson, doing business as the Independent Elevator Company; John Bibelheimer, doing business as the Washburn Grain Company; N. O. Parsons, doing business as the Independent Grain Company; A. C. Andrews, doing business as the Andrews Grain Company, all in the State of North Dakota, and Acme Grain Company, *all in the State of North Dakota, and Acme Grain Company,* Atlantic Elevator Company, George C. Bagley Elevator Company, Columbia Elevator Company, Dodge Elevator Company, Empire Elevator Company, Great Western Grain Company, Imperial Elevator Company, Miller Elevator Company, Minnekota Elevator Company, Monarch Elevator Company, National Elevator Company, Northland Elevator Company, Osborne-McMillan Elevator Company, Powers Elevator Company, Rugby Elevator Company, St. Anthony & Dakota Elevator Company, Victoria Elevator Company, Winter-Truesdell-Ames Com-

pany, Woodworth Elevator Company, and International Elevator Company, corporations organized and existing under and by virtue of the Laws of the State of Minnesota, Plaintiffs,

vs.

GEORGE F. SHAFER, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and Fay Harding, as the Board of Railroad Commissioners of the State of North Dakota, Defendants.

2 Pleas Before the Honorable Wm. S. Kenyon, United States Circuit Judge, Honorable Jas. D. Ellicott, United States District Judge, and Honorable J. W. Woodrough, United States District Judge.

Be it remembered that on the 6th day of December, A. D. 1922, a Bill of Complaint was filed in this case, which bill of complaint is in words and figures following, to-wit:

3 In United States District Court.

(Title of Case.)

Bill of Complaint.

[Filed Dec. 6, 1922.]

To the Honorable the Judges of the District Court of the United States for the District of North Dakota:

The plaintiffs above named bring this, their Bill of Complaint, against the defendants above named, and complain and state as follows:

I.

That the plaintiffs, the Farmers Grain Company of Embden, Farmers Elevator Company of Wimbledon, the Berwick Farmers Grain Company, the Grandin Farmers Grain Company, the Hampden Farmers Elevator Company, the Walhalla Cooperative Elevator Company, the Glenfield Cooperative Association, the Farmers Cooperative Elevator Company of Cando, the Benedict Farmers Cooperative Elevator Company, the Farmers Elevator & Mercantile Company of Rogers, and the Cayuga Farmers Elevator Company are corporations organized and existing under the Laws of the State of North Dakota; that they each own and operate elevators at a station in North Dakota.

That each of the plaintiffs in this Paragraph I is a farmers cooperative elevator company; that it purchases and assembles the grain of its stockholders and of others at the station where its elevator is located, transports the same by railroad to the terminal markets beyond the State of North Dakota, principally to the Minnesota

terminal markets at Minneapolis and Duluth, and there sells the same; that it distributes as patronage dividends any surplus arising from such transactions; that it retains no profits from such transactions; that its elevator is necessary for the transaction of its said business and is used solely by it as a facility in carrying on such business.

II.

That W. M. Noddings, doing business as the Noddings Grain Company, owns and operates an elevator at Napoleon; L. L. Kruchten, doing business as the Perth Elevator, owns and operates an elevator at Perth; that J. C. Smith, doing business as Alexander Grain Company, owns and operates an elevator at Alexander, North Dakota; F. M. Cook, doing business as the Woodworth Grain Company, owns and operates an elevator at Woodworth; John A. Aird owns
4 and operates an elevator at Lawton; Alexander Harchanko, doing business as the Independent Elevator Company, owns and operates an elevator at Benedict; Robert Fleming owns and operates an elevator at Dresden; James Whelan owns and operates an elevator at St. Thomas; Pierce Blewett, doing business as the Star Elevator Company, owns and operates eleven elevators at different stations in the State of North Dakota; Hans Neilson, doing business as the Elk Valley Farms Company, owns and operates an elevator at Larimore; E. H. Ray owns and operates an elevator at Surrey; Arnold Bros. own and operate an elevator at Berwick; C. H. Sheldon owns and operates an elevator at Minnewaukan; Louis Gjere, doing business as the Cando Grain Company, owns and operates an elevator at Cando; Schilling & Kruger own and operate an elevator at Linton; O. B. Sorenson owns and operates an elevator at Pillsbury; V. W. Steele, doing business as Jud Elevator Company, owns and operates an elevator at Jud, North Dakota; John Southall owns and operates an elevator at Berlin; J. A. Frank owns and operates an elevator at La Moure; H. C. Sorenson, doing business as the Independent Elevator Company, owns and operates an elevator at Balfour; John Bibelheimer, doing business as the Washburn Grain Company, owns and operates an elevator at Washburn; N. O. Parsons, doing business as the Independent Grain Company, owns and operates an elevator at Courtenay; and A. C. Andrews, doing business as the Andrews Grain Company, owns and operates forty-six elevators at different stations; all in the State of North Dakota.

III.

That each of the plaintiffs in this Paragraph III named is a corporation organized and existing under the Laws of the State of North Dakota, and that each owns and operates elevators in said State—Lybeck Grain Company, eleven elevators at different stations; I. L. Berge Elevator Company, seven elevators at different stations; Regan & Lyness Elevator Company, seven elevators at different stations; Kensal Farmers Elevator Company, an elevator at Kensal; Chamley Bros. Grain Company, an elevator at Cooperstown; Gwinner Farmers

Grain Company, an elevator at Gwinner; Freeborn Elevator Company, an elevator at McVille; Hazen Grain Company, an elevator at Hazen; Eldrige Farmers Elevator Company, an elevator at Eldrige; Carrington Grain Company, an elevator at Carrington; Pingree Grain Company, an elevator at Pingree; Farmers Grain Company, eighteen elevators at different stations; Cargill Elevator Company, fifty-six elevators at different stations; Occident Elevator Company, seventy-two elevators at different stations.

IV.

That the plaintiffs named in this Paragraph IV are corporations organized and existing under the Laws of the State of Minnesota, and own and operate elevators in North Dakota at different stations—Acme Grain Company, seventeen elevators; Atlantic Elevator Company, thirty elevators; George C. Bagley Elevator Company, five elevators; Columbia Elevator Company, nine elevators; Dodge Elevator Company, fifteen elevators; Empire Elevator Company, eleven elevators; Great Western Grain Company, forty elevators; Imperial Elevator Company, twenty-two elevators; Miller Elevator Company, one elevator; Minnesota Elevator Company, twenty-five elevators; Monarch Elevator Company, seventy-eight elevators; National Elevator Company, forty-nine elevators; Northland Elevator Company, thirty elevators; Osborne-McMillan Elevator Company, thirty-eight elevators; Powers Elevator Company, forty elevators; Rugby Elevator Company, four elevators; St. Anthony & Dakota Elevator Company, ninety-five elevators; Victoria Elevator Company, twenty-one elevators; Winter-Truesdell-Ames Company, fourteen elevators; Woodworth Elevator Company, thirty-five elevators; and International Elevator Company, thirty-one elevators.

V.

That each of the plaintiffs is engaged in interstate commerce in grain conducted by buying grain in the State of North Dakota, largely from producers, causing the same to be transported to terminal markets outside of the State of North Dakota, principally to the Minnesota terminal markets at Minneapolis and Duluth, and selling such grain at these terminal markets; that at the different stations where their elevators are located, the plaintiffs severally and independently of each other buy such grain; that the elevators located in the State of North Dakota and belonging severally to the plaintiffs were constructed and are used by the plaintiffs to facilitate the transferring of grain from farmers' wagons when bought to railroad cars for such shipment beyond the State as rapidly as carload lots of one kind and grade of grain are accumulated and cars
6 for loading can be obtained; that each of the plaintiffs has carried on such interstate grain business and commerce during the season of 1921 and 1922 and will continue such business during the season of 1922 and 1923 unless prevented from so doing.

VI.

That the property used by each of the plaintiffs in the conduct of its business, including elevators and equipment, is of a value in excess of Ten Thousand Dollars ($10,000.00); that the right of each plaintiff to carry on and continue such business greatly exceeds in value the sum of Three Thousand Dollars ($3,000.00).

That the aggregate amount of wheat which the plaintiffs independently of each other buy, transport and sell in interstate commerce in their said business originating in North Dakota in normal crop years exceeds thirty million (30,000,000) bushels.

VII.

That there are situated in the State of North Dakota a large number of country elevators, approximately twenty-two hundred (2,200), including the elevators owned by these plaintiffs, and said elevators are used by their respective owners severally in conducting an interstate business and commerce in grain originating in the State of North Dakota in all respects similar to the business conducted by these plaintiffs; that because of the large number of persons engaged in said grain business in the same way and under like conditions with these plaintiffs, it is impracticable to join all by name as parties plaintiff herein; that this action is brought by the plaintiffs named herein on behalf of themselves and all other persons and corporations engaged in the same business and subject to the same conditions herein set forth who may join as plaintiffs or who may be shown to be entitled to relief hereunder.

VIII.

That North Dakota produces more spring wheat than any other — of the United States; its crop varies from one hundred million (100,000,000) bushels to one hundred fifty-six million (156,000,000) bushels annually; this wheat when marketed moves largely to other States; approximately ninety per cent (90%) of the wheat
7 raised and sold in North Dakota is bought in interstate commerce and is actually transported by rail to the terminal markets outside of the State, principally to the Minnesota terminals at Minneapolis and Duluth; this movement has existed for many years and will necessarily continue in the future because consumers of wheat and wheat products throughout the United States are largely dependent upon wheat grown in North Dakota for their supplies and the producers of wheat in North Dakota are largely dependent upon the consumption of that grain outside of the State of North Dakota for their market; that there is no market in the State of North Dakota for the aggregate amount of wheat bought by the plaintiffs herein named from producers in the State of North Dakota; to accommodate this commerce facilities have been developed not only by the building of country elevators connected with railroad tracks at all stations

within the grain growing area throughout North Dakota by those engaged in this commerce, as above stated, but as well by the construction of elevators of great capacity at the terminal markets in which this wheat is received and held until it is milled or exported and by the construction of large flour mills at Minneapolis and other points in the State of Minnesota; that the aggregate capacity of the terminal elevators at the Minnesota terminals exceeds ninety-two million (92,000,000) bushels; that the flour mills located at Minneapolis, Minnesota, mill annually approximately seventy-five million (75,000,000) bushels of wheat; thousands of persons are actually engaged in carrying on this interstate grain business and commerce and enormous permanent investments have been made to provide facilities for such interstate commerce in grain.

IX.

That the defendant Svenbjorn Johnson is the duly elected, qualified and acting Attorney General of the State of North Dakota; that the defendants Frank Milhollan, President, C. W. McDonnell and W. H. Stutsman are the duly appointed, qualified and acting members of the Board of Railroad Commissioners of the State of North Dakota and together constitute the Board of Railroad Commissioners of said State.

X.

8 That under and in accordance with the Act of Congress of the United States, known as the United States Grain Standards Act, 39 United States Statutes at Large, Chapter 313, page 482, the Secretary of Agriculture of the United States has heretofore, by Service and Regulatory Announcements Number 33 and 46, established standard grades for corn, wheat and oats and that said standards are and have been in force during all of the time herein mentioned; that thereunder there have been appointed and there are stationed at all primary grain markets and terminals Federal Inspectors charged with the duty of inspecting and grading all grain arriving at such terminal market in interstate commerce in accordance with the official grain standards of the United States; that the corn, wheat and oats handled by the plaintiffs herein is subject to and is graded by such Federal Inspectors according to the official grain standards of the United States; that the Secretary of Agriculture, under authority of the provisions of the Federal Grain Standards Act, has promulgated rules with reference to the grading of grain, the determination of the dockage therein and all other matters involved in and connected with the inspection and grading of grain, which said rules and regulations are in force and are used and applied by the Federal Inspector in such inspection and grading of grain handled by the plaintiffs and others as herein described.

XI.

That at the general election of the State of North Dakota held November 7th, 1922, there was voted upon an initiative measure entitled,—"An Act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors, and warehouses handling such farm products; and making an appropriation therefor", and by its terms known as the "North Dakota Grain Grading Act"; that the result of the vote upon said Act has been announced and said
9 Act declared to have received a majority of votes, and that thereby said Act became and is an existing law and statute of the State of North Dakota.

That said Act by its terms directs and requires the Board of Railroad Commissioners of the State on or before the 8th day of December, 1922, to appoint for a term of four years a Supervisor of Grades, Weights and Measures, who shall be an expert in the grading, weighing and measuring of all kinds of grain, seeds and other agricultural products; and provides that such Supervisor shall immediately assume the duties of his office and shall receive a salary of Thirty-six Hundred Dollars ($3600.00) per annum.

By the terms of said Act it is further provided and made the duty of the State Supervisor of Grades, Weights and Measures to fix and establish grades, weights and measures for all kinds of grain, seed and other farm products, and to prescribe standards of quality and conditions of same; and it is further provided and made the duty of said State Supervisor to investigate and supervise the marketing of grain, with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; and, in establishing grades, weights and measures, to consider the value of dockage and to require that the buyer should not be permitted to retain same without just compensation, and to require that the buyer shall pay the fair market value for same, or separate it and return it to the producer.

By the terms of said Act it is further provided that whenever the Secretary of Agriculture of the United States has established grades, weights and measures or any standards of quality in the condition of any grain, seed or other agricultural products under the United States Grain Standards Act, such grades, standards of quality and conditions, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this State.

By the terms of said Act it is further provided:

That, after grades, weights and measures shall have been fixed and established, then no person thereafter shall buy by grade any such farm product, unless it shall have been inspected and graded by an

inspector licensed under the provisions of this Act or under
10 the provisions of the United States Grain Standards Act, and
the grade by which it is bought be one of the grades fixed and recognized under the provisions of said Act;

That the State Supervisor of Grades, Weights and Measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicy owned warehouse, elevator or flour mill handling agricultural products, provided that such buyer, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the State Supervisor of Grades, Weights and Measures;

That a State warehouse license must be obtained through the State Supervisor of Grades, Weights and Measures for each and every public warehouse handling grain, seed or other farm products in the State, the license fee for such warehouse to be fixed by the State Supervisor of Grades, Weights and Measures, and shall not exceed One Dollar ($1.00) for each one thousand (1,000) bushels capacity of such warehouse;

That any public warehouseman or individual buying grain who does not pay cash in advance for the grain so bought, shall be required to file with the State Supervisor of Grades, Weights and Measures, a bond running to the State, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash;

That every public warehouseman shall keep a record of the names and addresses of their respective warehouses, elevators or mills, the price paid for agricultural products, the grades given, the price received, and the grades received at the terminal markets or within the State, which information shall be furnished to the Supervisor of Grades, Weights and Measures upon written request.

That, in case of any dispute as to grades, weights or measures between the producer and the purchaser, operating a public warehouse, elevator or mill, handling agricultural products, then a sample shall be taken from such farm product, and shall be sent to the Supervisor of Grades, Weights and Measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.

11 That it shall be unlawful for any person to grade grain, seed or other agricultural products, who has not been licensed by the Supervisor of Grades, Weights and Measures, or who does not hold a license to grade, weigh or measure grain, seed or other agricultural products under the United States Grain Standards Act.

That the State Supervisor of Grades, Weights and Measures is authorized to employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary. The expense thus incurred and other expenditures for the operation and maintenance of the Department of Grain Grading, shall be paid from the appropriation made and the funds received from the licensing of elevators, warehouses and mills handling agricultural prod-

ucts; and that the salary of the State Supervisor of Grades, Weights and Measures shall be paid out of the Grain Grading Fund.

It is further provided by said Act that all the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are transferred and made part of the duties of the Supervisor of Grades, Weights and Measures.

XII.

That, in order to engage in interstate commerce in grain produced in North Dakota in a practical manner or in substantial quantities, it is necessary to own and operate elevators or warehouses at stations where producers bring grain for sale. That in practically all cases the sole object and purpose of the person who acquires an elevator or warehouse at such station is to handle through the same grain bought from producers, and that while under the Statutes of the State of North Dakota such warehouses are required to receive grain for storage and do in fact so receive it, substantially all such grain received for storage is ultimately sold by the producers storing the same to the owners of the elevator at such time as the producer is satisfied with the market price of such grain, and in actual
12 practice, because of the limited capacity of elevators, stored grain is often shipped to the terminal market immediately upon its receipt and in advance of an actual sale of the same by the producer to the owner of the elevator. That it is, in the conduct of such interstate commerce in grain in North Dakota, impracticable to keep separate the grain sold by different producers to the owner of an elevator and ship such grain separately to a terminal market where it might be graded by a Federal Inspector, and it is necessary, in the actual conduct of such grain business, to assemble and mix in the elevator the purchased grain of different producers until there is a sufficient quantity of one grade of grain to load a car for shipment.

By the terms of said North Dakota statute in practice grain must be graded by buyers owning or employed by the owners of elevators where such grain is received and purchased from producers. No inspectors licensed or appointed under the United States Grain Standards Act are stationed at the points where such elevators are located, and under the United States Grain Standards Act, buyers of grain cannot be appointed as Federal Inspectors. That it will be difficult or impossible for the owners of elevators to buy grain from producers, in compliance with the provisions of the North Dakota Statute for interstate movement, and the movement of grain from the State of North Dakota in interstate commerce would be greatly hampered and impeded, and, in some instances, prevented if said statute were put into effect and its provisions enforced.

That the license fees fixed by said Statute of North Dakota for operating an elevator is a direct tax and burden upon the purchase of grain in North Dakota for movement in interstate commerce, for the reason, among others, that said elevators are required as an in-

strumentality in such purchase and movement of such grain. That the license fees fixed and permitted by said Act are unreasonable and exorbitant and place a direct, unnecessary and unreasonable burden upon interstate commerce in grain originating in the State of North Dakota.

That there is now in force and effect in the State of North Dakota statutes fully regulating the operation of warehouses and re-
13 quiring the licensing of the same by the State, placing the same under the supervision and control of officers of the State of North Dakota and fixing license fees to be paid by the owners more than adequate to pay all costs and expenses incurred by the State in such licensing and supervision. That the so-called North Dakota Grain Grading Act does not materially change the supervision of such warehouses, but seeks to control and regulate the buying of grain in interstate commerce by the owners of such elevators, and to require such owners as buyers to procure a license, and fixes under the guise of a fee for an elevator license in reality an unreasonable and exorbitant fee for the privilege of buying grain in interstate commerce, a fee much in excess of the present warehouse license fee.

That the provision of said statute *statute* requiring owners of elevators to furnish to the State Inspector the prices paid for agricultural products and the grades given, the price received and the grades received at the terminal markets requires the keeping and making of reports to an officer of the State of North Dakota, as such, of transactions in interstate commece; that such requirement is beyond the power and authority of the State; that if enforced it would involve a substantial expense to each of the plaintiffs and would constitute a direct and unwarranted burden upon interstate commerce.

That the requirement of a bond as a condition of the purchase of grain interferes with the right of contract and with the free movement of grain in interstate commerce.

XIII.

That the provision of said Act requiring the State Supervisor to supervise the marketing of grain, with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage and other unlawful practices, was intended to and does in fact authorize said State Supervisor to regulate, control and interfere with the purchase and movement of grain in interstate commerce.

XIV.

That by the provisions of said statute, the duties and powers prescribed by Chapter 138 of the Laws of 1919 for the State In-
14 spector of Grades are conferred upon the State Supervisor of Grades, Weights and Measures. That said Chapter 138 is in scope, purpose and effect, substantially identical with the statute adopted at the general election, November 7th, 1922. That in the case of the Farmers Grain Company of Embden vs. William Lemke, et al., said statute was held to be and declared invalid by the Circuit

Court of Appeals of the Eighth Circuit, because and on the grounds: that the same imposed a direct and unreasonable burden upon interstate commerce, and that the same was in conflict with the United States Grain Standards Act. That thereafter on appeal to the United States Supreme Court such decision of the Circuit Court of Appeals was affirmed. That while the State Statute adopted in 1922 differs in detail from said Chapter 138 it, like the former statute, does interfere with and places a direct burden upon interstate commerce and it does to the same extent and in the same manner as the former statute conflict with United States Grain Standards Act.

That the purpose and effect of the so-called North Dakota Grain Grading Act was to,—in total disregard and in protest against said decisions declaring said Chapter 138 invalid, and in total disregard of the commerce clause of the Federal Constitution, and of the provisions and force of the United States Grain Standards Act,—reestablish by statute the control by the State of the marketing of the entire North Dakota Grain crop and the movement of such crop in interstate commerce, and the control by the State of the determination of the grades and dockage of such grain as a condition precedent to such grain moving in interstate commerce and to control through state licenses all persons seeking to buy North Dakota grain for shipment out of the State, and to place upon such interstate commerce the great and unreasonable expense and burden of maintaining a State Department charged with this duty of directly interfering with and controlling the interstate commerce in North Dakota grain.

XV.

That while said North Dakota Grain Grading Act by its terms provides that grades established under the United States Grain Standards Act shall be the established grades under the State Act, it does contemplate, provide and require that the actual grading of grain bought in North Dakota in interstate commerce shall be done and the grade of such grain be established by buyers licensed as State Inspectors, who cannot be designated as Federal Inspectors. Such State Inspectors must determine the grade of such grain under and in accordance with the State Statute and the rules established by the State inspector. In case of dispute an appeal must be taken to the State inspector. No provision is made for appeal to a Federal inspector or the Secretary of Agriculture. Under the United States Grain Standards Act, such grain when it arrives at and is sold in the terminal market outside of the State of North Dakota must be graded by and the grade determined by Federal Inspectors with the right of appeal to the Secretary of Agriculture. Upon the same grain a different grade and different dockage will frequently be established for and in the purchase of grain from that established for and in the sale of the same grain in a single interstate commerce transaction. In this way and in many other respects and provisions the North Dakota grain grading act conflicts with the United States Grain Standards Act, and would if enforced render interstate commerce in grain uncertain, difficult and subject to unnecessary risks and burdens.

XVI.

That many of the elevators owned and operated by the plaintiffs herein, because of the limited capacity and lack of machinery and facilities for screening grain, are and will be wholly unable to separate the dockage from grain when such grain is purchased at the elevators. That in the purchase of grain valuable dockage contained therein is and has been taken into consideration in fixing the price to be paid therefor. That the State statute requiring a specific payment for dockage or the separation and return of the same to the seller, if enforced, would interfere with the right to freely contract for and purchase grain in interstate commerce.

That producers of grain can, if they desire, separate the dockage from the grain before the sale thereof. That to require elevator companies to separate such dockage from the grain, especially during the period of rapid crop movement, would deprive the owners of elevators of the use of such elevator to facilitate the transfer of grain bought by them from the producers' wagons to railroad cars.

16 That the power attempted to be conferred by the so-called North Dakota Grain Grading Act upon the State Inspector to compel the owners and operators of elevators in the State of North Dakota using such elevators in interstate commerce to purchase and place in such elevators cleaning machinery so that grain bought by them can be cleaned and the dockage separated from the grain is an unreasonable, arbitrary and unwarranted requirement and would confer upon the State Inspector unreasonable and arbitrary powers; that such requirement and the exercise of the power sought to be conferred would result in a direct, excessive and great burden upon interstate commerce and upon the privilege and right of engaging in such commerce in the State of North Dakota.

That said statute by its terms deprives the owners of elevators of their property without due process of law.

XVII.

That the plaintiffs herein are tax payers in and to the State of North Dakota; that the appointment of a State Supervisor of Grades, Weights and Measures under the provisions of said State Statute, and the payment to him of the salary provided by said Act, will place a direct burden of taxation upon the plaintiffs and will increase their respective taxes.

XVIII.

That unless restrained by order of this Court from so doing, the defendants, constituting the Board of Railroad Commissioners of the State of North Dakota, will as such Board on or before the 8th day of December, 1922, appoint some person as Supervisor of Grades, Weights and Measures, and such person will immediately assume the duties of his office and begin to and thereafter receive a salary of Three Thousand Six Hundred Dollars ($3,600.00) per annum, and

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will proceed to put in effect said statute and require these plaintiffs to comply with all the provisions thereof.

That unless restrained from so doing, the defendant, the Attorney General of the State of North Dakota, will enforce against these plaintiffs, and each of them, all the penalties prescribed by said Act for non-compliance with the provisions thereof.

17 That such action on the part of the defendants will cause irreparable injury and damage to the plaintiffs and their respective properties, and the plaintiffs have no plain, speedy or adequate remedy at law in the premises.

XIX.

That the amount involved in this suit, exclusive of interest and costs, as to each of the plaintiffs, exceeds the sum of Three Thousand Dollars ($3,000.00).

XX.

That plaintiffs are advised by counsel and allege the fact to be that said statute adopted at the election of November 7th, 1922, is wholly void and invalid, and that the same violates the Constitution of the United States in the following, as well as in other respects:

(1) It violates Article 6 of the Constitution of the United States, in that it conflicts with and is in contravention of the United States Grain Standards Act (39 U. S. Statutes at Large, Chap. 313, p. 482) and Service and Regulatory Announcements Numbers 33 and 46, establishing thereunder official grain standards of the United States for wheat, shelled corn and oats.

(2) It violates Section 8 of Article 1 thereof, in that it interferes with commerce between the States and places a direct and unreasonable burden upon such commerce.

(3) It violates the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of propery without due process of law and denies to the plaintiffs the equal protection of the law, and abridges the right of the plaintiffs to contract.

XXI.

That said Statute of North Dakota adopted November 7th, 1922, is in violation of the Constitution of the State of North Dakota and especially of Section 11 and of Section 20 and of Section 25 and of Section 61 and of Section 85 thereof.

XXII.

That these plaintiffs are actively engaged in interstate commerce in grain and are operating their respective elevators in connec-

18 tion therewith continually; that they each will refuse compliance with the provisions of said statute of North Dakota and any rules and regulations which may be promulgated thereunder; that any enforcement of said Act and the resulting inter-

ference with the respective elevators and business of the plaintiffs, even for a few days, would cause each of the plaintiffs great and irreparable injury, and the plaintiffs hereby claim for themselves respectively and for all others similarly situated the protection of the various laws and constitutional provisions hereinbefore stated.

Wherefore, plaintiffs pray that the defendants may be required to make full and true answer to this Bill of Complaint (not under oath, their oath being hereby expressly waived).

That this Court order and decree that the provisions of said statute of North Dakota adopted November 7th, 1922, known as "The North Dakota Grain Grading Act," are in conflict with the Constitution of the United States and with the Act of Congress and regulations thereunder above referred to establishing Federal standards for grading wheat, oats and corn, and that said statute places an unnecessary and unreasonable burden upon interstate commerce in grain, and that said statute is wholly invalid and void.

That the defendants, their agents, servants and employees, and all officers of the State of North Dakota subordinate to and under the direction of said defendants, be restrained and enjoined, during the pendency of this action, from enforcing the provisions of said statute and from instituting against these plaintiffs, or any of them, or of the employees, or any of them, criminal prosecutions or other proceedings at law for alleged violation of said statute.

That the defendants, the Board of Railroad Commissioners, be enjoined and restrained from appointing a Supervisor of Grades, Weights and Measures, under the provisions of said Statute. That, if such Supervisor is or shall be appointed, that he be restrained from enforcing any of the provisions of said statute, and that all said defendants and all officers of the State of North Dakota, and all agents, servants and employees thereof, be enjoined and restrained from in any manner interfering with these plaintiffs, or any of them, in the buying of grain and fixing the price thereof, and from tres-
19 passing upon the property of the plaintiffs, or any of them, and that the force and effect of said statute be suspended and its enforcement as to these plaintiffs be enjoined until the final determination of this cause.

That on the trial of this cause such restraining order and injunction be made permanent.

And that the plaintiffs have such other and further relief as to Your Honors shall seem meet.

Dated this 5th day of December, 1922. David F. Simpson, Lancaster, Simpson, Junell & Dorsey, H. A. Libby, Attorneys for Plaintiffs, 630 First National-Soo Line Bldg., Minneapolis, Minnesota.

STATE OF MINNESOTA,
County of Hennepin, ss:

A. C. Andrews, being first duly sworn, says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated

on information and belief, and that, as to those matters, he believes them to be true. A. C. Andrews.

Subscribed and sworn to before me this 5th day of December, 1922. Ruby M. Reiter, Notary Public, Hennepin County, Minn. (Notarial Seal.) My Commission expires Nov. 5th, 1926.

20 [File endorsement omitted.]

21 In United States District Court.

[Title omitted.]

Motion for Interlocutory Injunction.

[Filed Dec. 6, 1922.]

To the Honorable Judges of said Court:

Comes now the plaintiffs herein by their attorneys, and make this, their motion and application to this Court for an interlocutory injunction against the defendants, and each of them, individually and in their respective capacities as officers of the State of North Dakota, enjoining and prohibiting said defendants, either as individuals or as representatives of the State of North Dakota, from acting under or in pursuance of or from in any way carrying out or enforcing any of the provisions of the Statute of the State of North Dakota adopted at the general election held November 7th, 1922, entitled,—"An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors, and warehouses handling such farm products; and making an appropriation therefor",—and by its terms known as the "North Dakota Grain Grading Act", and suspending the force and effect of said the North Dakota Grain Grading Act so far as concerns these plaintiffs and any others similarly situated who may join in said action or be shown entitled to the same relief therein, such interlocutory injunction to remain in force until the final hearing of this cause and the determination of this Court as to the issuance of a permanent injunction therein or the further order of this Court.

22 And, further, until the hearing upon and the determination of this motion for an interlocutory injunction, that the defendants and each of them be restrained from, either as individuals or as representatives of the State of North Dakota, acting under or in pursuance of said State statute, and that the force and effect of said statute be suspended until the further order of this Court.

This motion is made upon the verified Bill of Complaint hereinbefore filed and upon the ground that these plaintiffs will suffer grave

and irreparable damage prior to the hearing of this cause if said interlocutory injunction be not granted and prior to the hearing upon said interlocutory injunction if a restraining order be not issued herein as prayed. David F. Simpson, Lancaster, Simpson, Junell & Dorsey, 630 First National-Soo Line Building, Minneapolis, Minnesota; Hiram A. Libby, Grand Forks, North Dakota, Attorneys for Plaintiffs.

[File endorsement omitted.]

23 [Title omitted.]

Temporary Restraining Order.

[Filed Dec. 6, 1922.]

Upon reading and filing the Bill of Complaint herein, and on motion of the plaintiffs' counsel,

It is Ordered that the hearing upon said motion for an interlocutory injunction be had at the Court Room of this Court in the Federal Building in the City of Fargo N. D. at ten o'clock A. M. of the 16th day of December, 1922, and that the defendants show cause, if any there be, before this Court at said time and place why an interlocutory injunction should not issue as prayed by said Bill.

And it appearing to the Court that it will be prejudicial to the public interest and will cause irreparable injury to the plaintiffs herein if the purchase and movement of grain in interstate commerce from the State of North Dakota shall be suspended or disturbed pending the hearing of the foregoing motion, which cannot be heard until at least five (5) days' notice of such hearing shall be given to the defendants,

It is Further Ordered that the defendant Svenbjorn Johnson, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and W. H. Stutsman, as the Board of Railroad Commissioners of the State of North Dakota, and all subordinate officers and agents of said defendants, be enjoined and restrained from attempting to enforce or comply with the provisions of the statute of the State of North Dakota by its terms known
24 as the North Dakota Grain Grading Act, and from performing any Act specified therein, and from in any manner interfering with these plaintiffs in carrying on their respective business without compliance with the provisions of said Act, and that said Act be suspended as to its force and effect until such hearing and decision.

That a copy of this order certified under the hand of the clerk and seal of the court be served on each of the defendants to be restrained.

Dated this 6th day of December, 1922, at 10:20 A. M. o'clock of said day. By the Court: Andrew Miller, Judge of the District Court.

[File endorsement omitted.]

24½ Attached to said Restraining Order are the following returns of the United States Marshal.

Marshal's Return.

[Filed Dec. 16, 1922.]

24½*a* Form No. 465.

DISTRICT OF NORTH DAKOTA, *ss:*

I hereby certify and return, that on the 6th day of Dec., 1922, I received the within Restraining Order and that after diligent search, I am unable to find the within named defendant, W. H. Stutsman, within my district. Reported to be in Iowa. James F. Shea, United States Marshal, by Howard H. Strack, Deputy United States Marshal.

24½*b* Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of North Dakota, ss:

I hereby certify and return that I served the annexed Certified copy of Restraining Order on the therein-named R. A. Nestos, as Governor in and for the state of North Dakota by handing to and leaving a true and correct copy thereof with him personally at Fargo, in said District, on the 9 day of Dec., A. D. 1922. James F. Shea, U. S. Marshal, by J. J. Ryan, Deputy.

[File endorsement omitted.]

24½*c* Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of North Dakota, ss:

I hereby certify and return that I served the annexed Certified Copy of Restraining Order on the therein-named Sveinbjorn Johnson, as Attorney General for the state of North Dakota, by handing to and leaving a true and correct copy thereof with him personally, at Bismarck, in said District, on the 7th day of Dec., A. D. 1922. James F. Shea, U. S. Marshal.

24½*d* Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of North Dakota, ss:

I hereby certify and return that I served the annexed Certified Copy of Restraining Order on the therein-named Frank Milhollan, as Commissioner on the Board of Railroad Commissioners for the state of North Dakota by handing to and leaving a true and correct copy thereof with him personally at Bismarck, in said District, on the 7th day of Dec., A. D. 1922. James F. Shea, U. S. Marshal.

24½*e* Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of North Dakota, ss:

I hereby certify and return that I served the annexed Certified Copy of Restraining Order on the therein-named C. W. McDonnell, as Commissioner on the Board of Railroad Commissioners, for the State of North Dakota by handing to and leaving a true and correct copy thereof with him personally at Bismarck in said District on the 7th day of Dec., A. D. 1922. James F. Shea, U. S. Marshal.

24¾ In United States District Court.

(Title of Case.)

Stipulation Postponing Hearing.

[Filed Dec. 16, 1922.]

Whereas, the above entitled action was commenced in said court by the service of a verified bill of complaint application for interlocutory injunction, and restraining order or interlocutory injunction, dated December 6, 1922, and served on the defendants on December 7, 1922, and is now pending in said court, and,

Whereas plaintiffs' petition for said interlocutory injunction was set to be heard at Fargo, North Dakota, at 10 o'clock in the forenoon of the 16th day of December, 1922, and

Whereas, it is deemed necessary for the convenience of the court, attorneys, and all interested parties that said hearing be postponed to some future date.

Now, therefore, it is stipulated and agreed by and between all parties plaintiff to said action, and all of the said defendants, through

the undersigned their respective attorneys of record, that the
25 hearing upon plaintiffs' motion for an interlocutory injunction be, and the same hereby is, postponed from December 16, 1922, to January 5, 1923, at 10 o'clock in the forenoon at the Federal Court Room in the City of Fargo, North Dakota, and that the Judge of said court may make and file the order of the Court in accordance herewith, and,

It is further stipulated and agreed that at the time of the hearing of said motion the same shall be presented, heard and considered, in the same manner in all respects as though said hearing were and had upon said original order, as to time of hearing.

It is further stipulated and agreed that in case affidavits are prepared in behalf of defendants, for use upon said motion and hearing, copies of the same shall be furnished to plaintiffs' counsel at Grand Forks and Minneapolis if possible five days before the date of hearing.

It is further agreed that this stipulation applies to and is made in behalf of all of the individual plaintiffs named in said action, most of whose names are omitted in the title hereof, for convenience, but that as to such plaintiffs and in whose behalf this stipulation is made, reference is here made to plaintiffs' bill of complaint of date December 5, 1922, and served herein.

Dated and signed at Fargo, North Dakota, this 13th day of December, 1922. David F. Simpson, Lancaster, Simpson, Junell & Dorsey, 630 First National Soo Line Building, Minneapolis, Minnesota; H. A. Libby, Grand Forks, North Dakota, Attorneys for Plaintiffs. Seth W. Richardson, Special Assistant Attorney General for the State of North Dakota, Attorneys for Defendant, Fargo, North Dakota.

[File endorsement omitted.]

26 Order Entered on the Journal of this Court for the Southeastern Division, on December 16th, 1922:

Order Continuing Hearing.

(Title of Case.)

A stipulation having been duly made and filed consenting to the passing of the hearing on complainants' motion for an interlocutory injunction to the 5th day of January, 1923, at ten o'clock in the forenoon, at the Federal Court Room in the City of Fargo, North Dakota, signed by the Attorneys representing the parties herein,

Now, therefore, it is hereby ordered that said hearing be continued to said time and place and the restraining order herein is continued in force until the hearing and determination upon said motion for an interlocutory injunction.

In the United States District Court.

(Title of Case.)

Stipulation for Modification of Temporary Restraining Order.

[Filed Dec. 28, 1922.]

Whereas, it appears that there are large quantities of wheat and other small grains stored in warehouses in the State of North Dakota, and some or much of this is likely to be shipped out of the state and disposed of in the markets of the country as soon as freight cars can be obtained for the purpose, and,

Whereas it further appears that in many instances the holders of storage tickets, who are generally farmers in the state, are not adequately protected by surety bonds furnished by the warehouses, and it is desirable that there be the fullest protection to such storage ticket holders in the state, and

Whereas, it further appears that there are probably some warehouses in the state which now have a large storage liability, whose bonds are inadequate, and which may be in a doubtful condition financially,

Now, therefore, it is stipulated and agreed by and between
27 the parties to the above entitled action, and ny and between the attorneys for the respective parties thereto, that the interlocutory order made by the above entitled court, restraining the defendants and each of them during the pendency of this action, and until the final hearing of this cause and the determination of this court as to the issuance of a permanent injunction herein, or the further order of the court may be by the court modified by its order, so that the proper officials of the state of North Dakota shall have and may exercise the authority to require new bonds or additional bonds, wherever it may be necessary in the judgment of such officials, in order to ade-uately protect storage ticket holders in the state of North Dakota.

It is further stipulated and agreed by the parties hereto, that this stipulation shall not in any court be considered a waiver of any of the points raised by the plaintiffs with reference to the constitutionality of the law challenged in this proceeding, and that this stipulation shall not be adverted to by counsel upon either side for any purpose whatsoever, before any tribunal upon the hearing of the above entitled matter on the merits, or for any interlocuatory or intermediate orders therein, except for the purpose of obtaining a modification of the restraining order heretofore issued in conformity with the purpose of this stipulation, and,

It is further stipulated and agreed, that upon any and all hearings had in the above entitled action in any court, the rights of the plaintiffs shall be and are in no manner abridged by reason of this stipulation, but that each and all of their rights are preserved, and may be asserted in the same manner as though this stipulation were not made.

Dated at Grand Forks, North Dakota, this 27th day of
28 December, 1922. David F. Simpson, Lancaster, Simpson, Junell & Dorsey, Minneapolis, Minnesota; H. A. Libby, Grand Forks, North Dakota, Attorneys for Plaintiffs. Sveinbjorn Johnson, Attorney General of North Dakota, Attorney for Defendants.

[File endorsement omitted.]

29 In the United States District Court.

(Title of Case.)

Order Modifying Temporary Injunction.

[Filed Dec. 28, 1922.]

Upon reading and filing the stipulation in the above entitled matter entered into by and between the plaintiffs and the defendant therein, and their respective attorneys, dated the 27th day of December, 1922, and upon all the files and records in the action, and upon the motion of Sveinbjorn Johnson, Attorney General of the State of North Dakota, and one of the attorneys for the defendants herein.

It is ordered that the interlocutory injunctional order made in the above entitled matter by the Court on the 6th day of December, 1922, at ten o'clock A. M., on said day, be, and the same is hereby, modified in the following manner: The proper officials of the State of North Dakota and the defendants herein shall, notwithstanding said interlocutory injunctional order, have and may exercise the authority to require new bonds or additional bonds of warehouses and elevators in the State of North Dakota wherever and whenever in the judgment of such officials and the defendants herein, it may be necessary in order to adequately protect storage ticket holders in the State of North Dakota who have stored grain in such elevators, or whose assignors have stored grain therein. It is the purpose of this order modifying the injunctional order aforesaid, to enable the proper officials of the state of North Dakota, and the defendants herein, to take the necessary steps to protect farmers and other persons who have stored grain in elevators and other warehouses in the State by requiring the necessary bonds to insure full protection on account of such storage.

This order is made pursuant to the stipulation herein referred — without any prejudice whatsoever to any of the rights of the plaintiffs herein to assert that the act, the constitutionality of
30 which is challenged in this proceedings, is unconstitutional and void.

It is further ordered that upon filing of this order, the said proper officials of the State of North Dakota and the defendants herein may proceed to require such new or additional bonds as may be necessary within the contemplation of the stipulation aforesaid, and in accordance with the terms of this order.

Dated this 28th day of December, A. D. 1922, at three o'clock P. M. Andrew Miller, Judge of the District Court of the United States, District of North Dakota.

[File endorsement omitted.]

In the United States District Court.

(Title of Case.)

Stipulation for Substitution of Parties Defendant.

[Filed Jan. 5, 1923.]

It is stipulated by and between the above entitled parties, by their respective attorneys, that George F. Shafer is now the duly qualified and acting Attorney General of the State of North Dakota, succeeding Sveinbjorn Johnson, the above named defendant, and that Fay Harding is now the duly elected, qualified and acting member of the Board of Railroad Commissioners, succeeding W. H. Stutsman, and that the said George F. Shafer as Attorney General, and said Fay Harding as one of the Board of Railroad Commissioners may be substituted as parties defendant for Sveinbjorn Johnson and W. H. Stutsman.

Dated January 4th, 1922. Lancaster, Simpson, Junell & Dorsey, H. A. Libby, Attorneys for Plaintiffs. Seth W. Richardson, Attorney for Defendants.

31 [File endorsement omitted.]

32 In United States District Court.

Before Hon. William S. Kenyon, United States Circuit Judge; Hon. James D. Elliott, United States District Judge; Hon. Joseph W. Woodrough, United States District Judge.

(Title of Case.)

Order. Entered January 5th, 1923.

Upon the stipulation filed this day, it is ordered that George F. Shafer, Attorney General, be substituted for Sveinbjorn Johnson, Attorney General, and Fay Harding for W. H. Stutsman, as defendants herein.

Argument and Submission.

This cause coming on for hearing upon the motion for a preliminary injunction, the complainants appearing by Messrs. Lancaster, Simpson, Junell & Dorsey, and H. A. Libby, Esq., their solicitors, and the defendants appearing by George F. Shafer, Attorney General, and Seth Richardson, Esq., their solicitors, after hearing arguments of counsel, the matter was submitted to the Court and taken under advisement.

33 In United States District Court.

(Title of Case.)

Answer.

[Filed Jan. 5, 1923.]

Defendants for their cause why an interlocutory injunction should not issue in the above entitled action, as prayed by the bill of complaint therein, allege as follows:

Section I.

With respect to the allegations of Paragraphs One, Two, Three, Four and Six, of the said bill of complaint, defendants have no information or belief, and therefore deny the same.

That defendants admit Paragraph Nine.

Defendants further deny each and every matter and thing set up or contained in the said bill of complaint except as hereinbefore or hereinafter admitted, qualified or explained, save and except that the defendants admit that Congress has passed, and there is now in force and effect the United States Grain Standards Act, (39 U. S. Stats. at Large, p. 42); and that the people of North Dakota duly enacted a measure known as the North Dakota Grain Grading Act; and further admit that unless restrained by order of this court, the defendants will use all proper means to enforce the lafwul provisions of the North Dakota Act.

Defendants further allege that prior to the notice of the issuance of the temporary restraining order heretofore issued in the above entitled action, and before said order was served upon defendants, or any of them, the said defendants, constituting the Board of Railroad Commissioners, did under the provisions of the said
34 North Dakota Grain Grading Act hereinbefore referred to, duly appoint John N. Hagan, a duly qualified citizen of the State of North Dakota, as the state supervisor of grades, weights and measures, as provided for in the North Dakota Grain Grading Act herein involved, and that the said Hagan thereupon duly qualified as such supervisor, and is now the duly appointed, qualified and acting supervisor under said act, and that George Schafer is now the duly elected and acting Attorney General, and Fay Harding the duly elected and acting member of the Railroad Commission, to succeed W. H. Stutsman, above defendant.

Section II.

Defendants for further cause why the application of the said plaintiffs for an interlocutory injunction should be denied, allege and state as follows, to-wit:

That the State of North Dakota has but one major industry, to-wit, the production and sale of its wheat crop. The transaction of

practically all business in the state is dependent upon such crop, and the moneys upon which the prosperity of the state depends, is very largely the proceeds of such grain crop; that the said crop is produced by the farmers of North Dakota, who constitute, with their families and dependents, by far the largest proportion of the population of the state.

That over seventy-five per cent. of the oats raised in the State of North Dakota remains and is consumed within the State, and that practically all the shelled corn remains and is consumed wholly within the State, and that there are in excess of 190 flour and feed mills located in the State of North Dakota, all of which are engaged in the milling of wheat, oats and corn, and that the products thereof are very largely consumed within the State of North Dakota.

Section III.

The physical marketing of the grain on the part of the farmer producer is subject to several inherent difficulties. In the first place, the season is short, and the harvest of the grain becomes general at the same time throughout the state. Very few farmers have sufficient storage facilities on their farms to take care of their grain, and it therefore becomes necessary for them to immediately rush the same to an elevator for storage or sale. The local transportation of this grain to the elevator is seldom done by the farmer himself, but is done by team, driven by hired men, women, children, or other members of the farmer's household. Such persons have usually no knowledge of grain, its grade, quality or condition, and are simply able to act as a means of transporting such grain from the farm to the elevator. All of these acts are done in a great hurry, due to short season, lack of storage room, and the necessity of giving such grain prompt attention, and under circumstances which prevent the farmer producer from having or maintaining any supervision, judgment or control over such grain himself.

Defendants further allege that the present Federal Standards and Grades on wheat are very different and more complicated than the old grades were, and are very much more technical, and that the average farmer, without the assistance of trained inspectors, cannot properly determine the grade of wheat which he raises and offers for sale.

Section IV.

When such grain arrives at the elevator under the circumstances and methods above stated, and is presented to the elevator, it must be then graded and inspected, regardless of whether the grain is received for storage or sale. This grading and inspection is supposed to be done in accordance with grades fixed under the United States Grain Standards Act by the buyer in charge of the elevator, and he is the only person ordinarily available with sufficient information and knowledge of grain to properly grade and inspect the same, and the grading and inspection of practically all grain is wholly dependent upon such buyer. That such buyer is usually in sole charge at

such elevator, and in the great majority of cases is the only person having knowledge of the prevailing grades and prices then being paid for grain. That the price of said grain either for storage or sale, is wholly fixed by such grade and inspection, and any and all returns or remuneration which the said farmer producer may receive for his sole product depends necessarily upon the grade
36 and inspection given to such grain by such buyer. That by reason of the situation and methods hereinbefore referred to, the farmer producer is wholly unable himself to exercise any supervision, care or control over such grain, and usually has neither the opportunity nor the knowledge to see that such grain receives proper grading and inspection and weights, and is therefore utterly dependent upon the honesty and competency of the said elevator buyer in connection with the sale and storage of said grain.

Section V.

That by reason of the conditions, facts and circumstances hereinbefore set forth, which have continued for many years and which must inevitably and necessarily continue in the future, grevious, flagrant and widespread evils, wrongs and offenses have, as defendants are informed and believe, grown up, flourished and become notorious throughout the entire state of North Dakota, and, as well, the entire grain-raising section of the country. That by reason of the fact that the said buyer aforesaid is in entire and sole control of the situation at the local elevator, and by reason of the fact that such grain buyer is the only person who has authority or power or knowledge in connection with the grading and inspection of the grain, and such grain buyer being invariably the employe of the elevator company purchasing or storing such grain, and to whom the farmer producer must sell, and being accountable to his principals only for the actual grades and inspections given, and being required to account for any shortage when grain purchased finally arrives at the terminals, such situation and practices have resulted in the widespread evils and wrongs above referred to.

That such evils and wrongs consist of systematic, widespread, persistent and intentional under-grading of grain; in not properly weighing and inspecting such grain; in depriving the farmer producer of valuable foreign contents of grain known as dockage; that by understanding and agreement, and at various and numerous places throughout the state, by reason of the lack of control and supervision over the marketing of grain, said elevator companies and
37 other persons buying grain for shipment, have been accustomed to, and at the present time take from the producer of said grain an unfair and unreasonable margin of profit in view of the prevailing price of such grain at the terminal markets, and the actual cost and expense of handling the same.

That the facts and circumstances and conditions hereinbefore set forth are a direct and inevitable inducement to such grain buyers upon the purchase or receipt of grain from the farmer producer, to

buy or receive said grain at as low a grade as possible, and to reduce the alleged weight of such grain to as low a figure as possible, and to appropriate all dockage in order that the returns to the elevator companies by whom such buyer is employed, or to such buyer himself, may be thereby augmented and increased.

Section VI.

That by reason of the foregoing facts and circumstances, it has become, and now is, the widespread and prevailing belief among the people of North Dakota generally, that such evils and improper practices as are hereinbefore alleged are now in full operation and existence by reason of the absence of any operative regulation or supervision of the said local grain business by any state or federal authority, and that the grain producers of said state are being deliberately robbed and cheated out of millions of dollars each year by reason thereof, and that such belief has for many years past, and at the present time, is, causing great and widespread disturbance, dissatisfaction, complaint and unrest among the people in North Dakota; that such understanding and belief has been entertained by the people of North Dakota for many years, and that by reason of such belief in the actual existence of the said evils in connection with the marketing of grain, that the subject has received the frequent attention of the people and officials of the said state, and that various measures have been voted on by the people and by the different legislatures of the State of North Dakota with a view to combating and minimizing such evils, and that such efforts have been made by means of constitutional amendments and legislative enactments, and particularly by the passage in 1917, and again in 1919, of legislative acts calculated to combat and minimize such evils; that the said 1919 Grain Grading Act,
38 was, as alleged in plaintiff's bill, held unconstitutional upon certain grounds and reasons set forth in detail in the opinion of the Supreme Court of the United States in the case of Embden Elevator Co. vs. Lemke, et al., recently decided; that in view of the fact that no legislative session would convene until January, 1923, and in view of the fact that the invalidation of the 1919 Grain Grading Act left the State of North Dakota without any enforceable law to protect its citizens against the evils hereinbefore referred to, and in order that the grain producers of the State might not be wholly unprotected in connection with the marketing and disposal of their grain, as hereinbefore set forth, there was caused to be initiated under the provisions of law in North Dakota a law known as the North Dakota Grain Grading Act, and that such measure, by its terms, referred to the existing wrongs and evils in connection with the marketing of grain, and expressly provided that the said initiated measure was for the purpose of minimizing and combating such evils, and that such measure was thereafter duly presented to the people of North Dakota at the general election held November 7, 1922, and was passed by the people of

North Dakota by a vote of more than three to one (138,735 for and 44,406 against), and that such act is the act now in force of which the said plaintiffs in their bill of complaint now complain.

Section VII.

Defendants further allege that the present law aforesaid is in all respects a bona fide attempt on the part of the people of the State of North Dakota, under its police power, to put in force and effect an inspection law for the protection of the people of the State, which is in accordance with the opinion, direction and mandates of the Supreme Court of the United States, as indicated in its opinion under the former law as aforesaid, and defendants allege and believe that the present law is different from, and independent of, the former law held invalid by the Supreme Court as aforesaid, and is based, in all material things, wholly upon the United States Grain Standards act, and is particularly in aid of such Act, and is not intended to, and does not constitute a burden upon interstate commerce, and is not in opposition or conflict with
39 the United States Grain Standards Act, or any of the rules issued or in force thereunder, and places upon plaintiffs no improper burden or interference, and that the carrying out and enforcement of the North Dakota Act complained of is made the duty of, and placed in the hands of a supervisor provided for under said act, which supervisor is, under the terms of the United States Grain Standards Act, entitled to become a United States Inspector, empowered under such Federal Act, having the same powers and duties as any Federal inspector at the terminal markets.

Section VIII.

Defendants further allege herein that they believe that the present law has eliminated the objections hereinbefore made by the Supreme Court in connection with the 1919 Act, and that the present law retains only the regulatory features with respect to grading and inspection, under the police power of the State, for the protection of the people of the State, and is wholly in aid of interstate commerce and of the United States Standards Act, and is not to any extent whatever a burden upon interstate commerce.

That the present Act, among other things, permits any person desirous of engaging in the business of grading grain, to act under a license from either the State or the United States; that no license fee is required, and that the grades to be enforced are as determined and authorized by the Federal Government, and that all of the rules and regulations of the Secretary of Agriculture under the United States Grain Standards Act are in effect, promulgated, enforced and adopted under the State Act; that such Act permits the uncontrolled buying of grain by sample or type, in exact manner and form as is permitted by the United States Grain Standards Act, and permits and provides for proper appeal

to the court from any withdrawal of license to engage in the business of grading grain, previously granted.

That under and by virtue of the provisions of the United States Grain Standards Act, the state supervisor provided for in the present State Act is appointed and becomes United States Inspector under the terms of the Federal Act, and that provision is made in the State Act for appeals from the decision of the local buyer, with reference to grades and conditions of grain, to such state supervisor, who is at all times a United States Inspector under the terms of the Federal Act.

That the so-called Federal Inspectors, acting under the terms of the United States Grain Standards Act, at the said terminals as aforesaid, are not Federal officials, but are persons duly appointed and selected under the authority of state grading and inspection laws, and receive their appointment as so-called inspectors under the United States Grain Standards Act under the terms of said Act, because and by reason of the fact that they are already inspectors under the State Act, and that such inspectors receive no pay or remuneration from the Federal Government, but are either paid by state authority, or from the perquisites and fees collected by reason of inspections made.

Section IX.

Defendants further allege that the present Act does not to any extent whatever harass, impede or conflict with the United States Grain Standards Act, or any of the rules and regulations of the Secretary of Agriculture issued thereunder, but that on the other hand the State Act is wholly in aid of said Federal Act, and entirely harmonious therewith; that under and by virtue of the provisions of the United States Grain Standards Act, the same is not exclusive, and is not intended to cover the entire grain business, and the existence and operation of the state grading and inspection departments is recognized and permitted, and the officials of such state department are required to be made inspectors under the Federal Act; that under the terms of said Federal Act, the same is entirely in control and in force at terminal points, and that no aim, purpose or intent exists in the said Federal Act to control or provide for any inspection or supervision at any other point, and particularly at the local elevator, and that under the rules and regulations issued by the Secretary of Agriculture and his subordinates in the operation and carrying out of the said United States Grain Standards Act, all duties of grading and inspection and supervision which may be necessary or advisable at the local elevator, *is* expressly turned over to, and made the duty of state grading and inspection systems; that while the 1919 Grain Grading Act heretofore declared unconstitutional, was in force and effect in the State of North Dakota, no embarrassment or conflict occurred in connection with the enforcement of said Act with respect to the United States Grain Standards Act, and that at no time

was there any interference with the said United States Grain Standards Act, or any burden placed thereon, or any trouble or complaint in that connection from Federal officials engaged in the enforcement of the Federal Act, but that the two Acts actually operated harmoniously and supplementary to each other, and the attention and judicial notice of the court is called to the various and numerous official regulations and announcements issued by, and under the authority of, the Secretary of Agriculture under the United States Grain Standards Act, and particularly to exhibits A, B and C hereto attached and made a part hereof.

Section X.

That the said United States Grain Standards Act, and the North Dakota Grain Grading Act, have the same general purpose and object, to-wit, the promulgation and use of uniform grades and conditions of quality, as fixed by the United States Government.

That the said Federal Act and State Act occupy, and have reference to, wholly separate and distinct fields of operation, the said Federal Act being confined to supervision of grading and inspection at terminal points after shipment by a common carrier, and the State Act being confined to requiring that grading and inspection in accordance with the grades fixed by the Federal Act be had, before the grain moves from the local point of shipment in interstate commerce; that neither of these fields of operation is antagonistic to the other, nor is one dependent upon the other, but they are supplemental to each other.

Defendants further allege that when the said grain moves from the local shipping point in interstate commerce, the ownership of practically all of said grain has passed from the local farmer
42 producer to the elevator company, and all legal right, title or interest in said grain has been parted with by the farmer producer, and he is no longer legally or financially concerned with such grain or any dealings in it; that therefore the inspection and grading of such grain upon its arrival at the terminals is of no particular materiality or benefit to the farmer producer, but operates almost wholly for the benefit and protection of the elevator company which then and there owns and controls practically all of such grain, and is for the purpose of assisting and protecting said elevator company, in connection with its own sale and disposal of said grain, and that such inspection at such terminals cannot to any practicable extent whatever affect, protect or have reference to, any right or due to which the farmer producer may have been entitled; that therefore the said United States Grain Standards Act is not intended to, and does not to any extent whatever, furnish any aid, guide or protection to the farmer producer, and does not go into effect or operation so far as the marketing of the grain at the local elevator is concerned, except as the same is required under the terms of the North Dakota Act, and in direct accordance with its provisions and the rules and regulations thereafter issued under it, it is the aim and intent of the Federal authorities enforcing such Federal Act, that said State

Grain Grading and Inspection Department shall take charge of, and put in operation and effect such grading and inspection at local points as will assure and cause the farmer producer to receive grades and conditions of quality provided and fixed by the Secretary of Agriculture under the said United States Grain Standards Act, and that such local field is left entirely to State supervision and control.

That in various and numerous announcements of rules, regulations and directions issued by the Secretary of Agriculture, and his duly authorized assistants, specific and detailed directions and opinions have been given to all persons interested in the marketing of grain, that all supervisory and regulatory work at the points of local
43 shipment, to-wit, the local elevator, must be performed by and through the agency of State inspection systems, and that the Federal Act was not designed to, and had no intention of applying to the manner and details of the original marketing of grain at the local elevator.

Section XI.

Defendants further allege that under the provisions of paragraph 12 in the bill of complaint in this case it is admitted that in the absence of the North Dakota Grain Grading Act, there is, and will be, no supervision of grading and inspection within the State of North Dakota whatsoever, and that no supervision can, or will, be had of the grading and marketing of grain at any local elevator in the State of North Dakota.

It is further admitted in paragraphs 5 and 15 of the bill of complaint that practically all of the grain purchased by the plaintiff is purchased from local farmer producers at local elevator points, and that a difference frequently exists between the grades extended to such farmer producer at the local point by the elevator buyer, and the grade which such grain finally receives at the terminal point.

Defendants therefore allege that under the provisions of plaintiffs' bill itself, if the enforcement of the State grain grading law is restrained, no control or supervision over the grading and inspection of grain will or can be had within the State of North Dakota, and that said plaintiffs will therefore not be, in fact, required to give the producers of North Dakota the grades and conditions of quality required by the Federal Act, and therefore that the farmer producers of the State of North Dakota will be compelled to sell and dispose of their grain under the facts and circumstances, and with the attendant wrongs and evils hereinbefore mentioned and set forth, and defendants allege that by reason thereof the farmer producers of this State will lose and be defrauded of many millions of dollars pending a decision of this case upon the trial on the merits.

44 Section XII.

That the said United States Grain Standards Act contains no provisions requiring the plaintiffs or any other elevator company to account to the farmer producer for the valuable dockage contained

in said grain, and that such proposition is not within the purview of the Federal Act.

Defendants further allege, as they are informed and verily believe, that it has at all times, unless prevented by law, been the uniform practice of elevator companies, and persons buying grain for shipment, to take and appropriate all valuable dockage in grain purchased by them, without making any allowance therefor, or paying any compensation for the same, and that it has been the universal custom to reduce the grade of grain purchased because of the presence in said grain of dockage, and thereby paying a lower price for the grain purchased by reason of the same having been given a lower grade; and that in addition thereto it has been the uniform practice, unless restrained by law, for the elevator companies to take and appropriate all of such dockage as their own property. Defendants further allege that such dockage is in the great majority of cases of great value, having a definite ascertainable market value, and that the appropriation of said dockage by the said elevator companies has been for many years one of the great and serious wrongs and evils growing out of the marketing of grain in the State of North Dakota, and was one of the evils and wrongs which the present law was intended and designed to prevent. That under the provisions of plaintiffs' bill of complaint, it is alleged that the said dockage is now fully paid and compensated for, by the plaintiffs, in connection with the present grading and inspection of grain purchased, and defendants therefore allege that the requirements in the present law requiring such compensation, causes said plaintiffs no damage, if the allegations of the said bill are true, but, in that regard, your defendants state and allege that they are informed and verily believe that the statements in said bill with respect to payment for said dockage are not true and correct, and that the said plaintiffs will pay or compensate for no dockage whatsoever unless compelled to by the enforcement of the North Dakota Grain Grading Act.

That in requiring payment for such dockage, or a return of such dockage to the grain producer, the said North Dakota Act herein involved does not conflict with or interfere with the United States Grain Standards Act, which merely defines what dockage is, but that the said North Dakota Act is purely a police measure, enacted for the necessary protection of the people of the State, in order that the irreparable loss and damage to the grain producers of the State by reason of the appropriation of such dockage as aforesaid, may be prevented.

That the average price for dockage of value on the Minneapolis market for the year 1919, ranged from $29.56 per ton in September, 1919, to $40.45 per ton in June, 1920. That the elevator companies throughout the State of North Dakota at the time of the marketing of the 1920 wheat crop were compelled under the law then in force, to pay for dockage or return the same to the farmer, and that the first 45 elevators reporting to the state officials charged with the enforcement of such law, showed a total amount paid for dockage of $71,301.83, or approximately an average of $1,600.00 per elevator,

and that said amount ran as high as $18,000.00 paid by a single elevator for dockage during a single year.

That the average percentage of dockage per bushel in wheat and flax amounts to approximately eight per cent in a normal year.

Section XIII.

Defendants therefore allege that if the enforcement of the North Dakota Grain Grading Act is restrained pending a trial of the merits in the above entitled action, that there will be no control or supervision over the grading of grain in North Dakota whatsoever, and that there will be no responsibility on the part of the plaintiffs for the commission of the wrongs and evils hereinbefore set forth and alleged, and that the farmer producers in North Dakota will be wholly deprived of protection against such evils, and will be
46 necessarily defrauded of many millions of dollars.

Section XIV.

That the great majority of the elevators and other persons engaged in buying grain for shipment in North Dakota, buy large quantities of said grain on credit, and receive large quantities of said grain in storage against which such elevator company issues its storage tickets in the usual way. That under the provisions of the North Dakota Grain Grading Act herein involved, provision is made whereby such elevator company or other person buying grain for shipment who does not pay cash in advance for the grain so bought and shipped, and is required to file with the supervisor under the act a bond running to the State of North Dakota, with good and sufficient surety, in an amount sufficient to cover the value of all farm products bought and not paid for in cash, and in addition thereto an additional bond in a sum of not less than $5,000, conditioned upon the faithful performance of the duty of public warehousemen in accordance with the law of the State; that at the present time in the State of North Dakota, warehouses in the State are full of grain, and that the bond liability heretofore required from said elevator companies is only a small fraction of the liabilities of said companies under storage and warehouse receipts; that as defendants are informed and verily believe, many of the said elevator companies and other persons engaged in buying grain for shipment, are virtually insolvent, and without sufficient financial responsibility, and that many of such elevator companies and other persons engaged in buying grain for shipment, are indebted in connection with the purchase and storing of such grain in an amount many times greater than the amount of bond now provided for by law; that defendants verily believe that many of the grain producers of the State of North Dakota will lose the amounts represented by their storage and warehouse tickets, and will suffer great and irreparable loss in connection therewith if said elevator companies and other persons purchasing grain for shipment as aforesaid are not required by law to furnish sufficient and adequate

bond to properly guarantee to the grain producers of the
47 State full and prompt payment of all their liabilities in connection therewith, and that the interlocutory injunction prayed for by the plaintiff will prevent these defendants and the State of North Dakota, and the supervisor named in the State Act, from requiring such additional security, and from affording the grain producers of the State of North Dakota the necessary and vital financial protection which such additional security would give, and that if the said temporary injunction against the enforcement of this Act is granted and allowed by this Court upon hearing, that defendants verily believe that many hundreds of thousands of dollars will be lost to the grain producers of the State of North Dakota by reason of the financial inability and irresponsibility on the part of persons and elevator companies now generally engaged in the buying of grain in North Dakota, as hereinbefore set forth.

That during the year 1921, as defendants are informed and believe, large sums of money were lost by the farmers of North Dakota by reason of the failure of various persons and companies engaged in the elevator business, and the buying of grain, by reason of the financial irresponsibility of such persons and such elevator companies, there being no law in force requiring a proper and sufficient bond, and that the inclusion within the present North Dakota Grain Grading Act of the provision requiring a proper bond, as therein provided, was due wholly or in part to the said previous experience of the grain producers of North Dakota, as above stated.

Section XV.

Defendants further allege that if the said State Grain Grading Law is permitted to remain in force and effect pending a trial of said action on the merits, that no improper burden or interference will be caused thereby, to, or upon, the said plaintiffs; that the only obligations or duties which will be imposed upon the plaintiffs by reason of the enforcement of the law, will be to require, that, if said plaintiffs desire to engage in the business of grading grain upon the grades and conditions established by the Secretary of Agriculture,
48 that such plaintiffs and other elevator companies shall procure a license from either the state supervisor, or from the Secretary of Agriculture, and that such license is without any expense to the said plaintiffs, and is solely for the purpose of assisting the Federal and State officials in knowing who is engaged in the occupation of grading grain and of seeing that the grades and regulations fixed by the Federal Act are actually kept in force and effect in connection with the local marketing of grain, and the people of the state be afforded proper protection thereby. That in addition to the procurement of such license, it would be necessary for the plaintiffs to pay a reasonable elevator license fee fixed under the provisions of said Act at not to exceed One Dollar for each one thousand bushel capacity of such elevator, and that such license fee, in view of the

many and manifest duties and supervision thereof on the part of the State and its officers, is in all respects reasonable.

That in substance and effect the only requirement that will be placed upon the plaintiffs by the operation of the State Grain Grading Law will be to require said plaintiffs to honestly and fairly put and keep in force and effect the grades and conditions of quality fixed by the United States Grain Standards Act, and that if the said plaintiffs and other elevator companies and persons buying grain as aforesaid, intend to, and shall put and keep in full force and effect, the grades and conditions of quality as fixed by the Secretary of Agriculture under the United States Grain Standards Act, that no burden or inconvenience or injury will be visited upon the plaintiffs or any other persons under the provisions of the State Act, and therefore that to grant the prayer of the plaintiffs herein for the granting of a temporary injunction herein, asked for, would in its sole, natural and essential force and effect, aid and encourage the continuance and increase of the abuses and evils hereinbefore set forth so far as these plaintiffs are concerned, and permit them to be practicably free to refuse to put in force and effect the proper grades and conditions of quality fixed by the Federal Act.

49 Section XVI.

Defendants further allege that if the enforcement of the said North Dakota Grain Grading Act is restrained pending a trial of said action on the merits, that the prosperity of the entire state of North Dakota will be seriously and irreparably injured and damaged. That if the said plaintiffs and other elevator companies and persons operating in the State of North Dakota are permitted to buy and receive such grain, without any supervision or control over the grading and inspection thereof, and said elevator companies are excused from giving due and sufficient bonds, that the commission of the wrongs and evils hereinbefore set forth will be even more extreme and flagrant than has been the case in the past, and that by reason thereof the great majority of the people of the State of North Dakota will be directly defrauded of a large portion of the money which they would otherwise be entitled to receive for their grain, and that there would, therefore, so far as the farmer producer is concerned, be absolutely no chance or opportunity to recover the amount of the loss.

Section XVII.

Wherefore your defendants respectfully pray the court that the application of the plaintiffs for an interlocutory injunction may be denied, and that the defendants and the State of North Dakota, and its proper officials, may be permitted to carry on and enforce the provisions of the said North Dakota Grain Grading Act pending the trial of the above entitled action on the merits. Geo. F. Shafer, Attorney General; Seth W. Richardson, Special Assistant Attorney General, Attorneys for Defendants.

50 STATE OF NORTH DAKOTA,
County of ——, ss:

George Schafer, Attorney General, and Frank Milhollan, C. W. McDonnell and W. H. Stutsman, as members of the Board of Railroad Commissioners, being duly sworn on their oath state that they have read the foregoing answer of the defendants to the order to show cause heretofore issued in the above entitled action, and that the matters and things set forth therein are true to their own knowledge, except as to the matters therein alleged on information and belief, and as to those matters they believe the same to be true. Frank Milhollan. C. W. McDonald. Fay Harding, Successor to W. H. Stutsman.

Subscribed and sworn to before me this 4th day of January, 1923. S. G. Severtson, Notary Public, State of North Dakota. (Seal.) My commission expires January 11th, 1924.

STATE OF NORTH DAKOTA,
County of ——, ss:

George F. Shafer, Attorney General, and Frank Milhollan, C. W. McConnell and W. H. Stutsman, as members of the Board of Railroad Commissioners, being duly sworn on their oath state that they have read the foregoing answer of the defendants to the order to show cause heretofore issued in the above entitled action, and that the matters and things set forth therein are true to their own knowledge, except as to the matters therein alleged on information and belief, and as to those matters they believe the same to be true. Geo. F. Shafer.

Subscribed and sworn to before me this 5th day of January, 1923. Seth W. Richardson, Notary Public, Cass Co., N. D. (Seal.) Com-Exps. Oct. 26-27.

51 **Exhibit A to Answer.**

Portions of Exhibit A Designated and Stipulated to be Incorporated Into the Record on Appeal.

United States Department of Agriculture,

Bureau of Markets,

Charles J. Brand, Chief.

Service and Regulatory Announcements.

No. 36.

Federal Grain Supervision and the Standards for Wheat Applied to 1917 Crop of Hard Spring Wheat, Including Comparison of Present and Revised Official Standards.

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(Page 2.)

The Federal Government grades for hard red spring wheat were put into effect on August 1, 1917, under the United States Grain Standards Act. This Act passed on August 11, 1916, authorizes the Secretary of Agriculture to establish grades for the various grains and to enforce uniform inspection and grading of such grains when shipped in interstate or foreign commerce.

Inspections for the purpose of the Act are performed by grain inspectors licensed by the Secretary of Agriculture. These inspectors are not employed by the Federal Government. They work either independently or are employed by the various grain exchanges or State Inspection Departments, and are not paid by the Federal Government. They cannot hold licenses to grade grain and at the same time be financially interested in the buying or selling of grain, or be in the employ of any person or firm financially interested in the buying or selling of grain. No person is permitted to inspect and certificate the grade of wheat for shipment in interstate or foreign commerce unless he holds a license under the grain
52 standards Act. The work of the licensed inspectors is under the direct observation of thirty-five Federal Grain Supervision offices maintained by the Department of Agriculture at important grain-inspection points.

In cases where the owner of wheat shipped in interstate commerce, or any other interested party, is dissatisfied with the grade given by the licensed inspector an appeal may be filed in the office of Federal Grain Supervision in charge of the District in which the grain was graded, in accordance with the regulations of the Secretary of Agriculture. In cases where the wheat is shipped in interstate commerce between non-inspection points, without inspection by a licensed inspector, disputes as to the proper grade of the wheat may be filed in the office of Federal Grain Supervision for the district in which the wheat is located, in accordance with the regulations of the Secretary of Agriculture. Employes of the Department of Agriculture do not inspect and grade grain for the public generally, and grain supervisors can grade grain for interested parties only in cases of appeals and disputes filed in the offices of Federal Grain Supervision as above indicated.

The principal purpose of the Grain standards Act is to provide for the establishment of standards for each class of wheat, or other grain as the case may be, to be effective for the inspection and grading of such grain at all markets in the United States, and for the supervision of inspection and grading under those standards so that any particular lot of grain should be given the same grade anywhere in the United States.

* * * * * * *

(Pages 9, 10, 11 and 12 preceding the Line "Revised Wheat Standards Effective July 15, 1918.)

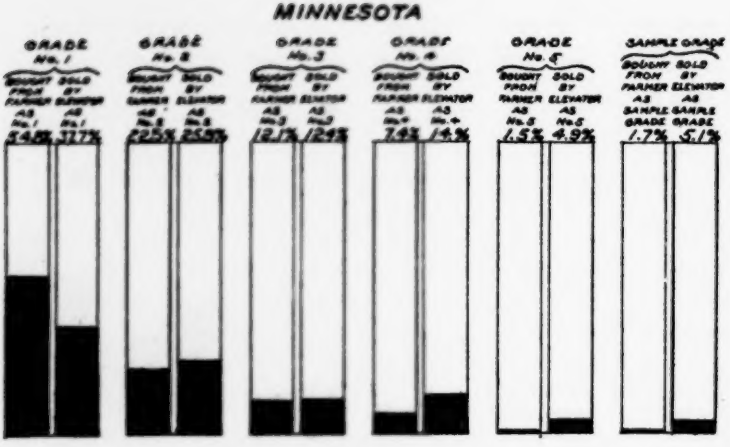


FIG. 6.

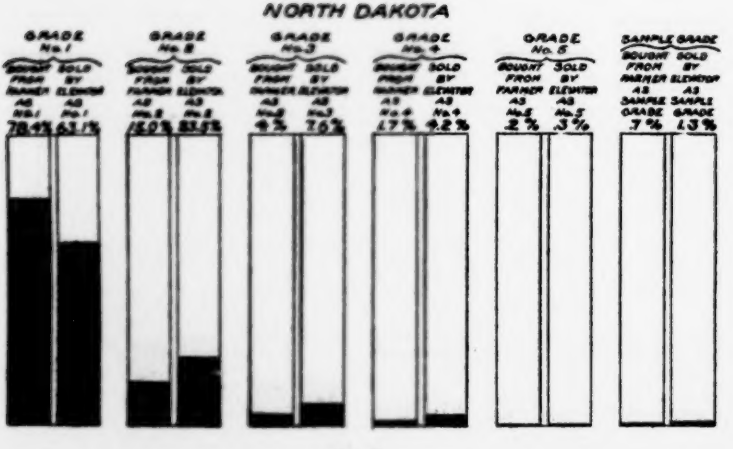
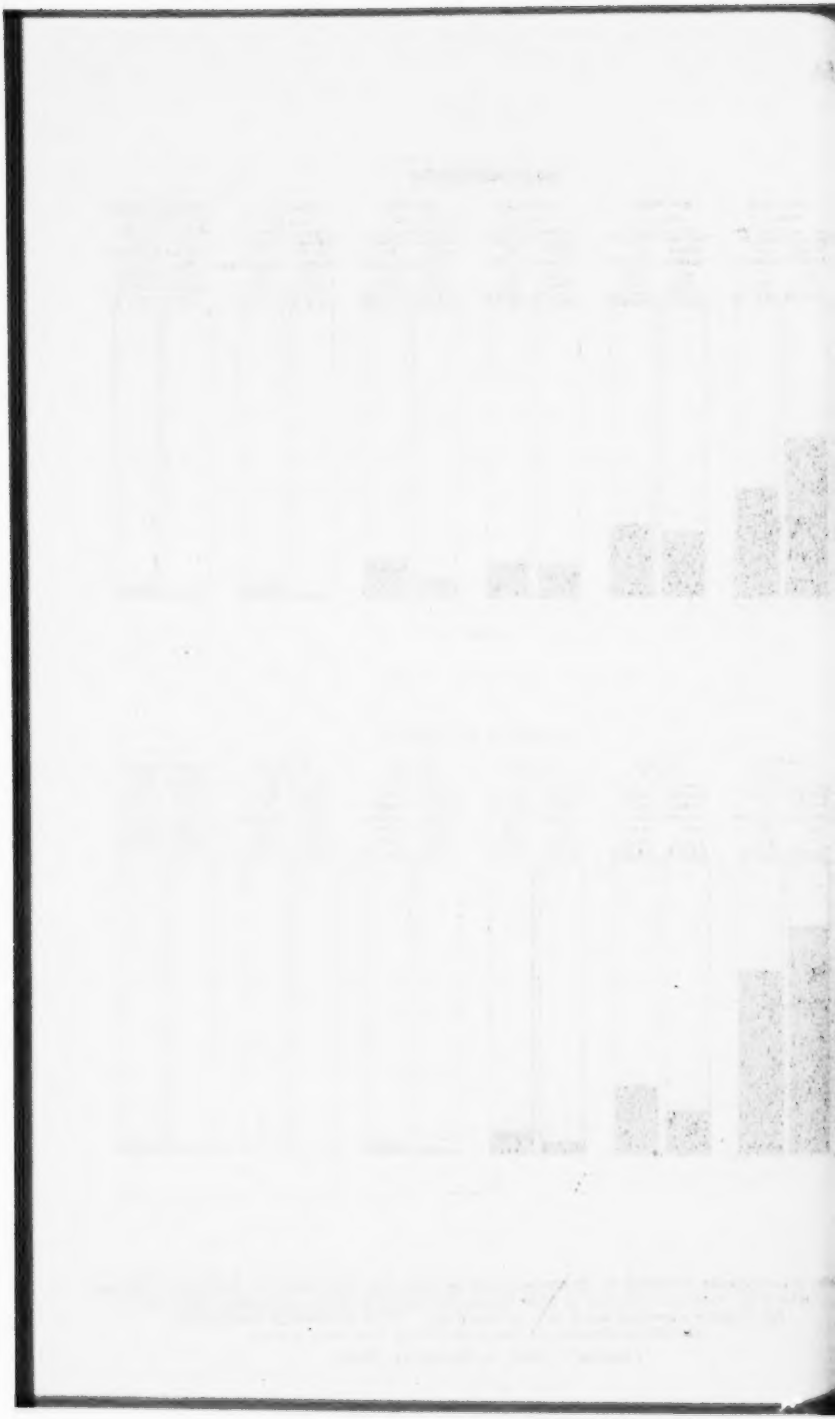


FIG. 7.

FIGS. 6-7.—Grades received by farmers upon delivery of 1917 crop of Hard Red Spring wheat at country elevators in Minnesota and North Dakota, and grades received by country elevators upon sale or shipment. (The percentage marks indicate the proportion of the crop falling into each grade.)

(August 1, 1917, to March 31, 1918.)



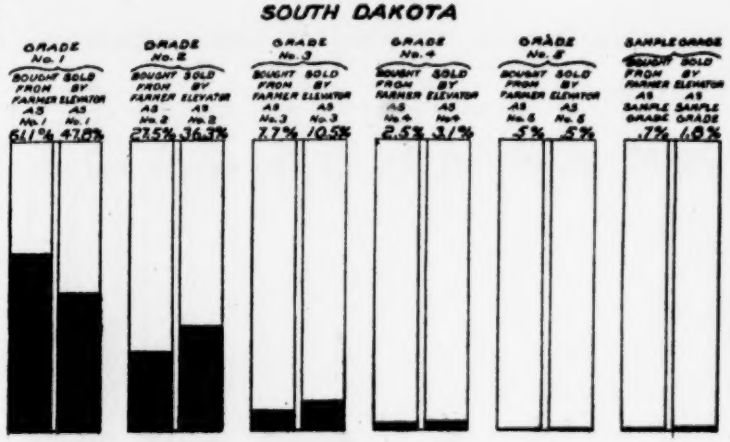


FIG. 8.

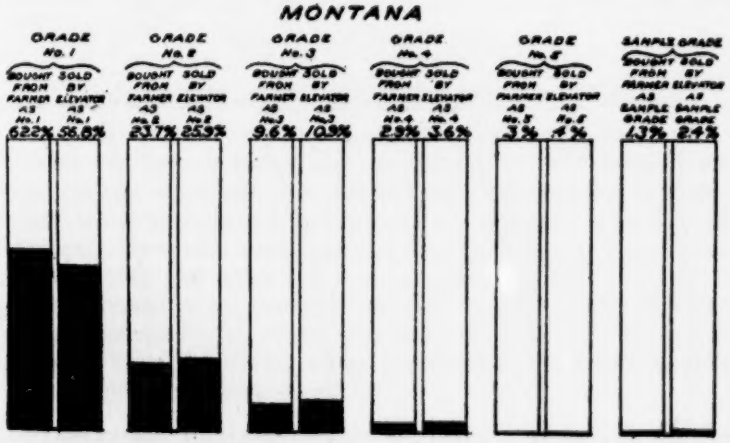


FIG. 9.

FIGS. 8-9—Grades received by farmers upon delivery of 1917 crop of Hard Red Spring wheat at country elevators in South Dakota and Montana, and grades received by country elevator, upon sale or shipment. (The percentage marks indicate the proportion of the crop falling into each grade.)

(August 1, 1917, to March 31, 1918.)

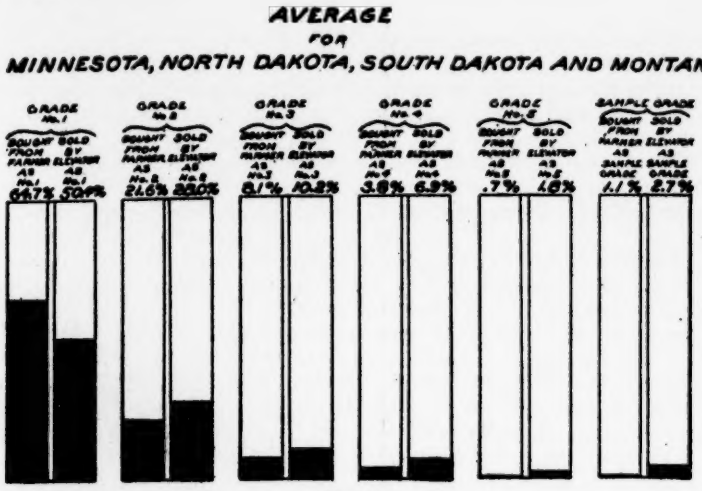


FIG. 10.

FIG. 10.—Average of grades received by farmers upon delivery of 1917 crop of Hard Red Spring wheat at country elevators and grades received by country elevators upon sale or shipment. (The percentage marks indicate the proportion of the crop falling into each grade.)

(August 1, 1917, to March 31, 1918.)

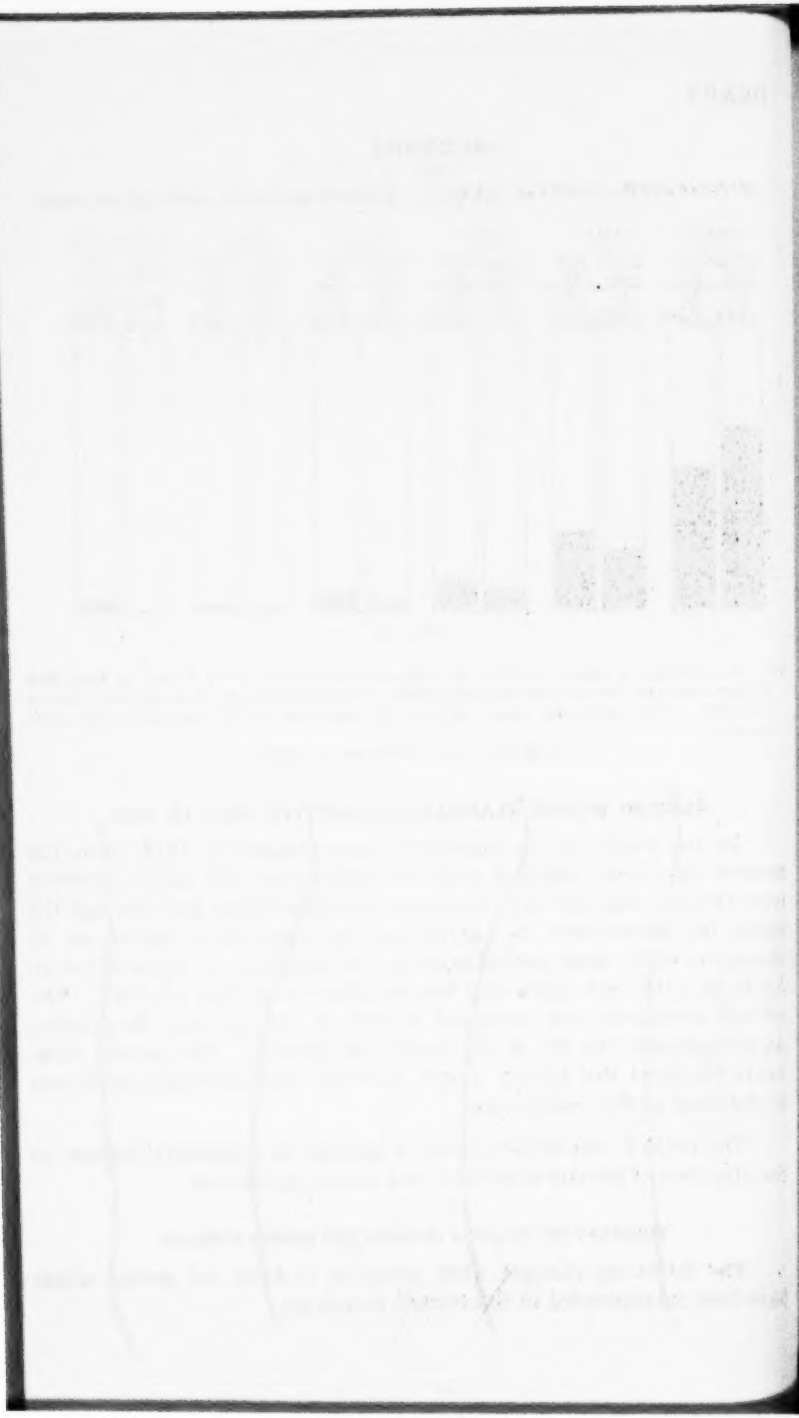
REVISED WHEAT STANDARDS EFFECTIVE JULY 15, 1918.

As the result of its experience since August 1, 1917, with the present standards, together with the suggestions and advice received from farmers and others at numerous public hearings and through the mails, the Department of Agriculture has prepared a revised set of standards which were promulgated by the Secretary of Agriculture on April 13, 1918, and which will become effective on July 15, 1918. The revised standards are published in full in Service and Regulatory Announcements No. 33, of the Bureau of Markets. The revised standards for Hard Red Spring wheat, tabulated and abridged, are shown at the back of this publication.

The revised standards contain a number of important changes in the direction of greater simplicity and easier application.

SUMMARY OF CHANGES IN HARD RED SPRING WHEATS.

The following changes with reference to hard red spring wheat have been incorporated in the revised standards:



53 Grades Received by Farmers from Country Elevators.

The grades in use prior to the 1917 crop embraced such uncertain and indefinite terms as "dry," "sound," "clean," etc., and each inspection department maintained its own interpretation of these terms. Under the Federal system, a single set of wheat standards is in use at all inspection points in the United States, and the personal element and uncertainty in grading are reduced to the minimum because definite limitations for the various factors are set forth in the standards and the application of these limitations is supervised by Federal Grain Supervisors.

Farmers shipping grain in carlots directly to terminal markets receive the benefit of the grades assigned by licensed inspectors, while the farmers selling wheat to the local elevators do not, as a rule, have this advantage and must accept grades assigned by the buyer or elevator man. With definite standards, the country buyer should no longer be compelled, in order to protect himself, to make allowances for such variations in the grading of grain at the terminal markets as have heretofore been made. There is no satisfactory reason why any country buyer cannot familiarize himself with the grades and apply them properly.

The Department of Agriculture in co-operation with the Federal Trade Commission has undertaken to determine the numerical grade of hard red spring wheat assigned to farmers' wheat by country elevators in the States of Minnesota, North Dakota, South Dakota and Montana on the 1917 crop handled to March 31, 1918, under the Federal grades, and also to determine the numerical grades assigned to such wheat going from these elevators by licensed inspectors at the terminal markets.

This information was secured directly from the country elevators in these States, which were required under the law to submit certified reports under penalty of fine or imprisonment. The diagrams (figs. 6 to 10) show the proportion of the hard red spring crop of 1917 (all subclasses combined) to March 31, 1918, which fell into each of the grades, as received from the farmer at the country elevator. Figures 6 to 10 also compare the proportion of the same crop as shipped from the same country elevators which fell into each of the grades as assigned by the licensed inspectors at the terminal markets or as sold by the country elevators by grade without inspection by licensed inspectors.

(Here follow diagrams marked pages 54-57, inc.)

58 **Exhibit B to Answer.**

Portions of Exhibit B Stipulated and Designated to be Incorporated Into the Record on Appeal.

(The First and Cover Page and Page 2.)

United States Department of Agriculture,

Bureau of Markets,

Charles J. Brand, Chief.

Service and Regulatory Announcements.

No. 481.

How Northwest Wheat is Grading at Terminals.

The object of this announcement is merely to show in a brief, concise way how wheat is grading in the Northwest under the official grain standards of the United States for wheat, in order that the farmers and country shippers may determine for themselves whether or not the Federal system is satisfactorily meeting their needs.

The Federal wheat grades for Hard Red Spring wheat are not working to the detriment of producers. An extremely large percentage of the wheat is receiving high grades at the terminals where it is inspected. If the buyer contends that he has to grade good wheat down "because the Federal grades require it" it is probably because he is not actually grading the wheat at all or is not assigning the grades correctly.

(Page 2.)

Wheat Grading at Minneapolis and Duluth.

When the farmer hauls his wheat to the station and sells it to the local elevator, a grade is placed upon it by the elevator manager and not by a licensed inspector because few inspectors are located at country points. This is true under the state grading systems as well as under the Federal grades.

Unless the grain is ground at the local mill, it is finally shipped to the terminal market, where it is graded by a disinterested inspector who is licensed by the Secretary of Agriculture. In deciding the grade, the inspector uses the grades established by the United States Department of Agriculture—the Federal grades.

59 In enforcing the grain standards Act the authority of the Federal Government reaches only shipments of grain in interstate commerce—from one state to another—or to foreign countries. It does not control the sale of wheat by grade if the sale itself does not involve a shipment to or through another state or to a

foreign country. But the Department of Agriculture, under the authority conferred by Congress to supervise the work of the licensed inspector, does control his work and sees that it is properly done. He is not allowed to contonue to inspect unless he is competent. If he is employed in any elevator or mill or has any connection with the buyong or selling of grain, he cannot secure a license and if he does not do satisfactory work his license may be suspended or revoked.

The Department cannot, however, control the country buyer or elevator man, or the miller who buys grain on the spot. Such transactions are in intrastate not interstate commerce. While the buyer may be using Federal grades. his grading is not under the jurisdiction of the Department. If he does not assign the grades honestly, fairly, and accurately, the state officials only can reach him. Practically all of the grain from Minnesota and North Dakota, and a large part of that from South Dakota, is eventually shipped to either Minneapolis or Duluth and it is there graded by inspectors.

This announcement shows the results of wheat grading at Duluth and Minneapolis. For the purpose of the announcement, inspections between July 15, 1918, and December 31, 1918 are taken into account, as the revised Federal grades became effective on July 15, 1918.

With the exception of Durham, practically all of the wheat produced in Minnesota, North and South Dakota, is Hard Red Spring wheat. This report is confined to the Hard Red Spring wheat and to inspections as the grain arrived at Minneapolis and Duluth.

60

Exhibit C to Answer.

Portions of Exhibit C Stipulated and Designated to be Incorporated Into the Record on Appeal.

(The First and Cover Page and Page 2.)

United States Department of Agriculture,

Bureau of Markets,

Charles J. Brand, Chief.

Service and Regulatory Announcements.

No. 541.

How Hard Red Winter Wheat is Grading under Federal Standards.

By John F. Wilmeth.

The purpose of this announcement is to show in a brief way the results of the grading of Hard Red Winter wheat by licensed grain inspectors under the Federal grades and the factors in the standards which have determined the grades assigned to this wheat.

(Page 2.)

In addition to fixing the grades for wheat, the Department of Agriculture is charged under the United States grain standards Act with the issuing of licenses to inspectors who grade grain under the standards and also with supervising the work of the inspectors. In enforcing the provisions of the Act, the Government's direct authority reaches only shipments of grain in interstate commerce—grain moving by grade from one state to or through another—or to foreign countries. The grain standards Act requires the use of the Federal grades only in connection with interstate shipments,
but these grades have been adopted in practically all states for
61 the grading of locally handled wheat. After the grades are established and put into effect, the function of the Department of Agriculture is to require these interstate shipments to be inspected by one of these licensed inspectors, if the shipment is made by grade from or to a point where there is an inspector, and then to see that the inspector does his work properly. The Department does not allow the inspector to continue to inspect if he is found to be incompetent. If he is employed by any elevator or mill, or has any connection with the buying or selling of grain, he cannot receive a license, and if he does not do satisfactory work his license may be suspended or revoked.

When the farmer hauls his wheat to a station in his own state and sells it to the local elevator, although it is bought and paid for by grade, he is making a transaction which does not require an interstate shipment. The grade in these cases is usually placed upon the wheat by the elevator manager. It is not then graded by a licensed inspector because the inspectors seldom are located at country points. This feature, is unfortunate, but the volume of inspection work at any one country shipping point is hardly ever large enough or continues over a sufficiently long period of time to warrant inspectors in taking up work at such points. Therefore, the correct grading of wheat at country points is usually a matter between the farmer and the local buyer and is one with which local authorities and not the Department of Agriculture can deal.

Unless this wheat is ground at a local mill in most cases it is finally shipped to a terminal market, where it is graded by a disinterested inspector who is licensed by the Department of Agriculture, and in deciding the grade of the wheat he uses the grades established by the United States Department of Agriculture—the Federal wheat grades.

62 Indorsed on back as follows: (Title of case.) Due and personal service of the within answer is hereby admitted this 5th day of June, 1923, by delivering of copy at Fargo, N. D., Lancaster, Simpson, Junell & Dorsey, H. A. Libby, Attorneys for Plffs.

[File endorsement omitted.]

63 In United States District Court.

(Title of Case.)

Interlocutory Injunction.

[Filed Jan. 5, 1923.]

The motion of the plaintiffs herein for an interlocutory injunction restraining the enforcement of a law of the State of North Dakota, known as the North Dakota Grain Grading Act, came on regularly before this Court, consisting of three judges, the Honorable William S. Kenyon, Circuit Judge, and Honorable J. W. Woodrough and the Honorable J. S. Elliott, District Judges, at Fargo, North Dakota, on the 5th day of January, 1923, pursuant to call duly made and notice duly given. Messrs. Lancaster, Simpson, Junell & Dorsey, and H. A. Libbey, Esq., appeared for the plaintiffs in support of said application for a temporary injunction, and Seth Richardson, Esq., and Honorable George F. Shafer, Attorney General, appeared for the defendants, in opposition to the granting of said injunction, and the Court having duly considered the bill of complaint and answer herein and the arguments of counsel, and it appearing that since the commencement of this action John N. Hagan was appointed State Supervisor of Grades, Weights and Measures under said Act, and said motion having been submitted to said court,

Now, Therefore, it is ordered, That the defendants and each of them, and the said Hagan, as Supervisor, and their respective agents, agents, servants and employes, be restricted and enjoined during the pendency of this action from enforcing, or attempting to enforce against the plaintiffs herein, the provisions of the said North Dakota Grain Grading Act, adopted at the general election in the State of North Dakota, in November, 1922, or any rules or regulations heretofore or hereafter established, or which may be Estab-
64 lished thereunder, and from instituting against the plaintiffs herein, or their employes, or any of them, criminal prosecutions, or other proceedings at law, for any alleged violation of said law, rules, or regulations, and from in any manner whatsoever interfering with the plaintiffs herein, in the buying and handling of grain, or in conducting their respective grain elevator business, as heretofore, in the State of North Dakota, and from taking any actions that would tend in any manner to interfere with said grain business in said State, under and by virtue of any power or authority attempted to be conferred by said law, or by any rules or regulations promulgated under said law, provided that the proper officers and agents of the State of North Dakota may, in accordance with the provisions of the act, require from persons or corporations engaged in the buying of grain on credit in the State of North Dakota suitable and sufficient bonds for the purpose of securing full payment

of the amounts due for grain so purchased, and as evidenced by storage and warehouse receipts outstanding.

It is further ordered, That plaintiffs furnish to defendants an undertaking in the sum of $10,000., protecting defendants against loss or damage by reason of said injunction, which undertaking shall be executed by some responsible surety company, and may be approved by J. A. Montgomery, Clerk of this Court, and filed within ten days from this date.

Dated January 5, A. D., 1923. Wm. S. Kenyon, United States Circuit Judge. Jas. D. Elliott, J. W. Woodrough, United States District Judges.

[File endorsement omitted.]

65 In United States District Court.

(Title of Case.)

Indemnity Bond.

[Filed Jan. 15, 1923.]

Know all men by these presents, That we, the undersigned, all of the plaintiffs named in the above entitled action and in plaintiffs original bill of complaint, as principals, and Hartford Accident & Indemnity Company of Hartford, Conn., as surety, are held and firmly bound unto the defendants named in the above entitled action and their successors in office in the sum of $10,000.00, lawful money of the United States to be paid to the said defendants, or their successors in office, for which payment well and truly to be made we do jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of January, A. D. 1923.

Whereas, the plaintiffs named in the above entitled action made motion in said court for an Interlocutory Injunction against the said defendants, their attorneys and agents, restraining them from putting into force in any manner, the initiated measure known as "The North Dakota Grain Grading Act" which was adopted at the general election in the State of North Dakota in 1922, pending this action and until final determination thereof, and

Whereas, said motion came on before the court at Fargo, North Dakota, on January 5, 1923, the Hon. William S. Kenyon, U. S. Circuit Judge and J. W. Woodrough and J. S. Elliott, U. S. District Judges, presiding, when said motion was duly argued and submitted, and an order duly issued and signed by said Judges on said day and filed with the Clerk of said Court in his office at Fargo, North Dakota, granting plaintiffs said motion and issuing an Interlocutory Injunction against each and all of the defendants, restraining them, their attorneys and agents from attempting to enforce the said North

Dakota Grain Grading Act or any of its provisions, pending this action and until final determination thereof, and

66 Whereas, said order was duly served on said January 5, 1923, by service upon defendants' attorneys at Fargo, North Dakota, and,

Whereas, it is provided by said order that plaintiffs execute in behalf of defendants a bond in the sum of $10,000.00, protecting defendants against loss or damage by reason of the issuance of said injunction, which bond it is provided shall be approved by the Clerk of said court and filed in his office.

Now, therefore, in consideration of the premises, we, the undersigned do hereby undertake, promise and agree to and with the defendants and their successors in office, that we will hold the said defendants harmless and protect them from any loss or damage by reason of the issuance of said Interlocutory Injunction, and that said plaintiffs will abide the order of the court made herein in all respects,

Conditioned, however, that our liability hereunder shall not exceed the sum of $10,000.00.

Witness, the hands and seals of said parties this 8th day of January, 1923. Farmers Grain Company of Embden, a Corporation, et al., Plaintiffs, by H. A. Libby, Attorney of Record for North Dakota. Hartford Accident & Indemnity Company, a Corporation, by J. O. Lummis, Attorney. By W. R. Liedike, Attorney, [Corporate Seal.]

STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

Be it known that on this 8th day of January, 1923, before me the undersigned, a Notary Public in and for said County and State personally appeared H. A. Libby, known to me to be one of the persons who executed the foregoing undertaking in the name and for and on behalf of plaintiffs, as attorney of record for plaintiffs within the State of North Dakota, and he acknowledged to me that he executed the same in the name of the plaintiffs and as their attorney of

67 record within the State of North Dakota, and as and for the act and deed of said plaintiffs. P. A. Lee, Notary Public, North Dakota. [Seal.] My Comm. Expires March 20, 1923.

STATE OF CONNECTICUT,
County of Hartford, ss:

On January 11th, 1923, before me personally came J. O. Lummis, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of Hartford; that he is the Attorney of the Hartford Accident and Indemnity Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the said J. O. Lummis further said that he is ac-

quainted with W. R. Liedike, and knows him to be the Attorney of said company; that the signature of the said W. R. Liedike subscribed to the within instrument is in the genuine handwriting of the said W. R. Liedike and was subscribed thereto by him by like order of the Board of Directors and in the presence of him, the said J. O. Lummis. Ray W. Dexter, Notary Public. [Seal.]

(Here follows Resolution of Company.)

[File endorsement omitted.]

68 In United States District Court.

(Title of Case.)

Reply.

[Filed Jan. 22, 1923.]

Come now the plaintiffs herein, and each of them, and for their reply to the answer and return of the defendants to the order heretofore made and entered herein directing the defendants to show cause why an interlocutory injunction should not issue in the above entitled action, as prayed by the bill of complaint herein, show the Court as follows:

I.

Deny each and every allegation, matter and thing alleged or contained in said answer or return except such allegations thereof as admit any of the allegations of the bill of complaint herein and except as hereinafter admitted or otherwise qualified or explained.

II.

Admit that George Schafer is now the duly elected and acting Attorney General as successor to the defendant Sveinbjorn Johnson as Attorney General, and that Fay Harding is now a duly elected and acting member of the Board of Railroad Commissioners as successor to the defendant W. H. Stutsman; and allege that John N. Hagan, a citizen of the State of North Dakota, purports to be the duly appointed, qualified and acting State Supervisor of Grades, Weights and Measures pursuant to the provisions of the North Dakota Grain Grading Act herein involved, and that it is claimed that said John N. Hagan was appointed as such by the Board of Railroad Commissioners of the State of North Dakota prior to the service upon
69 the defendants of notice of the issuance of a temporary restraining order herein, but that the plaintiffs have no knowledge or information sufficient to form a belief as to the truth or falsity of said facts and claim and therefore deny the same and each thereof; that said John N. Hagan, by reason of the facts hereinabove

set forth, is a proper party defendant in this action and should be impleaded as a party defendant herein.

III.

Allege that the difficulties, evils and abuses alleged in said answer or return to have grown up, flourished and become notorious throughout the State of North Dakota do not in fact exist; that the North Dakota Grain Grading Act of 1919, which, as alleged in the bill of complaint and admitted in the return or answer herein, has been held unconstitutional by the United States Supreme Court, was in fact adopted as a political measure and was only enforced for political purposes where such enforcement could be used as propaganda for the political party then in power and not otherwise; that the provisions of said 1919 Act and the rules and regulations promulgated thereunder by the Grain Inspection Department of the State of North Dakota were not indiscriminately enforced, but were administered with a view to furthering the interests of the political party then in power and discriminating against the line elevator companies and certain independent or farmers elevator companies and in favor of certain other independent or farmers elevator companies; that by reason thereof, the said 1919 Act and the rules and regulations promulgated thereunder resulted in heavy additional and unnecessary burdens upon the elevator companies and grain dealers in North Dakota who were thus discriminated against; that in effect the 1922 Grain Grading Act, which is the Act herein involved, was enacted for the same purpose and will be enforced and administered in the same partisan and discriminatory manner as the 1919 Act; that the Supervisor of Grades, Weights and Measures under the 1922 Act is invested with the same unlimited powers as was the Inspector of Grades, Weights and Measures under the 1919 Act; that the 1922 Act is in its creation and will be in its operation purely political; that, as indicated by the administration of the 1919 Act, the 1922 Act will be and is inherently capable of being administered in such a manner as to lead to innumerable discrimination and petty extortions; that it will cause continual controversies; that as between different types of elevators and the different political affiliations of the owners thereof there has not been and will not be any uniformity in the administration of grain grading laws in the State of North Dakota.

IV.

Allege that in the State of North Dakota there are three general types of elevator companies,—the line elevator companies, that is, companies owning and operating several elevators; the independent elevator companies owning and operating single elevators, the farmers co-operative elevator companies, the stockholders in which are grain producers and which companies do not operate for the purpose of making a profit because any profit is distributed to the stockholders in the form of patronage dividends; that about one-third of

the North Dakota grain is handled by the line elevator companies; that considerably more than one-third is handled by farmers co-operative elevator companies; that at most of the important grain shipping stations in North Dakota there are farmers co-operative elevator companies; that other elevators at such stations must buy grain in competition as to grades, weights and dockage and as to price with these farmers co-operative elevator companies; that the grain producers themselves are therefore competitive dealers and buyers; that the competition thus produced is far more effective and impartial in preventing fraud and unfair dealing in purchasing grain at country stations than any Statute, rules or regulations of the State of North Dakota.

V.

That the provisions of the 1922 Grain Grading Act requiring the buyer of grain to make a specific payment on account of dockage at its market value, or to return such dockage to the seller, and authorizing the Supervisor of Grades, Weights and Measures to regulate and prescribe the margin which the buyers of grain shall be permitted to take and requiring buyers of grain to take out a license and requiring buyers of grain who do not pay therefor in cash to furnish bonds are not rendered necessary or desirable by existing conditions; that the evils, abuses wrongs and offences alleged in said answer or return as the basis for the 1922 Act do not in fact exist.

71 VI.

Allege that heretofore, during the times when there has been no Grain Grading Act in force in the State of North Dakota, grain purchased in said State at country elevators or elsewhere, has not been under-graded, over-docked or under-weighed, but in fact, generally, either through over-grading, under-docking or overweighing there is a loss to the grain dealer represented by the difference between the country elevator standard and the terminal standard as established by Federal Inspection; that at most stations in the State of North Dakota and in other grain producing States two or more competing elevators are located and that stations are usually near enough together so that there is competition for a producer's grain between two or more stations; that by reason of this competition, for many years last past fair and adequate prices have been obtained by producers of grain therefor and in the matter of grade, dockage and weight said grain has as a rule been over-estimated at country points; that comparing the grade, dockage and weight given grain by buyers at country elevators with the grade, dockage and weight given the same grain under Federal inspection at terminal markets, the grade, weight and dockage at the terminal market show a loss; that this was found to be fact by the Federal Trade Commission after a careful investigation made immediately prior to September 15th, 1920, and it is stated in the report of the Federal Trade Commission on the grain trade, dated September 15th, 1920, at page 202, Vol. 1, that

"As shown by the table, however, the grand total loss on grading, weighing and docking combined amounted to $83,337.22, or a loss of 0.35 of a cent per bushel";

that as shown by the context in said report, the term "loss" is applied to the loss in grade, dockage and weight of the grain dealer buying grain at country points and selling it at the terminal markets under Federal inspection; that grain carrying valuable dockage commands a premium both at country points and at the terminal markets; that this premium measures fairly the actual net value of the dockage after the deduction of freight and cleaning charges.

***

72 Allege that the statements contained in said answer or return that in the absence of control and supervision by the State of North Dakota over the marketing of grain the elevator companies and other persons buying grain for shipment have been accustomed to and at the present time do take from the producer of said grain an unfair and unreasonable margin of profit in view of the prevailing price of such grain at the terminal markets and the actual cost and expense of handling the same are not in accordance with the facts; that under the 1919 Act the Grain Inspection Department of the State of North Dakota fixed the sum of six cents (6¢) per bushel as a reasonable margin of profit; that in many instances during the seasons of 1921 and 1922, when the purchase and shipment of grain was not subject to any control or regulation by the State of North Dakota, elevator companies in said State repeatedly bought and handled grain on a margin of four cents (4¢) and not to exceed five cents (5¢) per bushel; that by reason of the competition existing between elevators located at the same station and between stations which are near one another and by reason of the desire on the part of elevator companies to command and retain the farmers in the vicinity of their elevators as clients, the buyers at elevators have invariably taken a margin of profit which is as small as it is possible to take and still continue to carry on the business of operating elevators with a fair return on the capital invested therein.

That the objections of the plaintiffs herein to the 1922 Act are not based upon the requirement thereof that buyers pay a full and fair value for the grain purchased or the dockage contained therein, or the requirement that the buyers of grain shall be competent and shall correctly grade the grain they purchase, or the requirement therein that grain purchased on credit shall be paid for, or any of said requirements; that the plaintiffs and other grain dealers in the State of North Dakota have at all times met and satisfied all of said requirements and will continue to do so irrespective of the validity of said 1922 Act; that it does not follow and is not a fact, as alleged in said answer or return, that because the plaintiffs do not object to performing any specific requirement of said 1922 Act said Act and its enforcement would not cause the plaintiffs any damage; that said Act is objectionable for the reason that it is an interference with free

interstate commerce in grain; that it places the employees of
73 a grain buyer under the domination and control of officials of the State of North Dakota; that it enables the officials of the State of North Dakota to arbitrarily fix the prices at which grain may be bought without any reference to the market value thereof; that it enables the officials of the State of North Dakota to discriminate between certain favored elevators or elevator companies and other elevators or elevator companies; that it enables the officials of the State of North Dakota, after grain has been bought at a price agreed upon between the buyer and seller, unless a specific payment has been made for dockage contained therein, to compel the buyer, on pain of forfeiture of his license, to pay to the seller, in addition to the agreed price paid for the grain, a price fixed by the officials of said State as the value of such dockage, even though the value of such dockage was covered by a premium price paid for said grain, or even though the seller at the time the grain was sold stated that he did not want the dockage separated from the grain and returned to him; that in each particular instance, no matter how unwarranted such demands or requirements may be, it is usually easier and less expensive to comply with such demands and requirements rather than to go to the expense of an appeal to a partisan and prejudiced State Supervisor.

VIII.

Allege that the grading of grain cannot be done with mathematical certainty but necessarily involves the exercise of judgment and opinion on the part of those making the inspection; that competent and experienced inspectors will frequently give to the same grain different grades because of a difference in the judgment and opinion of the individual inspectors; that this is especially true if either of the inspectors has a tendency or inclination to give to the grain either a high or a low grade; that such differences in judgment or opinion as to the proper grade which should be given to grain can be reconciled and determined only by an appeal to some authoritative tribunal or individual; that under a dual system of inspection such as would be created if both Federal inspectors and inspectors licensed by the State of North Dakota inspect and grade the same grain, there will necessarily result frequent differences in the grade given the same grain at the time it enters interstate commerce by the purchase thereof in North Dakota and at the time it is sold at the terminal markets in Minnesota or elsewhere, and that the same will be true as to
74 dockage; that by reason thereof the 1922 North Dakota Grain Grading Act and the United States Grain Standards Act are in direct conflict and cannot be harmoniously administered together; that by reason of said facts the enforcement of the North Dakota Grain Grading Act will render interstate commerce in grain uncertain, difficult and subject to unnecessary risks and burdens.

IX.

Allege that the North Dakota Grain Grading Act is designed to compel any person desiring to engage in the business of buying grain

in North Dakota to secure from the Supervisor of Grades, Weights and Measures a license and to pay therefor; that the license fees nominally imposed by the 1922 Act on warehouses are the only source of revenue provided for the administration of this act; that heretofore an average fee of Six Dollars ($6.00) per year for each warehouse has provided ample funds for the administration of the rules and regulations governing the operation of warehouses; that the average capacity of country elevators in North Dakota is approximately thirty thousand (30,000) bushels; that under the 1922 Act the Supervisor of Grades, Weights and Measures is authorized to fix a warehouse fee of One Dollar ($1.00) per thousand bushels of capacity, or an average fee of Thirty Dollars ($30.00) per year per warehouse; that the difference between an average fee of Six Dollars ($6.00) per year and Thirty Dollars ($30.00) per year, to-wit, the sum of Twenty-four Dollars ($24.00) per year, is in effect and in fact to be paid under the 1922 Act as a fee for the buyer's license although nominally imposed as a warehouse fee.

Wherefore, the plaintiffs pray that the relief prayed for by the bill of complaint hereby be granted, and further that John N. Hagan, a citizen of the State of North Dakota, purporting to act as State Supervisor of Grades, Weights and Measures, be impleaded herein as a defendant by order of the Court. Lancaster, Simpson, Junell & Dorsey, 630 First National-Soo Line Bldg., Minneapolis, Minnesota; H. A. Libby, Grand Forks, North Dakota, Attorneys for Plaintiffs.

75 STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

R. F. Gunkelman, being first duly sworn, says that he is an officer, to-wit the secretary, of Grandin Farmers Grain Company, one of the plaintiffs named in the above entitled action; that he has read the foregoing reply and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters that he believes them to be true. R. F. Gunkelman.

Subscribed and sworn to before me this 15th day of January, 1923. R. A. Lee, Notary Public, N. D. (Seal.) My com. expires March 20, 1923.

Indorsed on back as follows: (Title of case.) Reply. Service of the within reply is hereby admitted this 19 day of January, 1923. Seth W. Richardson, Attorney for Defendants.

[File endorsement omitted.]

Attached to said reply is a letter in words and figures following to-wit:

75½ Law Offices of Hiram A. Libby,
Suite No. 515,
Northwestern National Bank Building,
Grand Forks, N. D.
20 January, 1923.

Hon. J. A. Montgomery, Fargo, North Dakota.

DEAR SIR: In the case of Farmers Grain Co., of Embden, et al., v. Sveinbjorn Johnson, Attorney General, et al., I herewith hand you plaintiffs' reply to the defendants' answer, and will ask that you please file this with the other papers in the case.

Mr. Richardson has informed me that they desire to regard the answer to the Order to Show Cause now on file in your office, as their answer on the merits, and therefore it is to this answer that we file this reply. Yours very truly, H. A. Libby. HAL:HB. CC:S. CC:R.

76 In United States District Court.

(Title of Case.)

Plaintiffs' Præcipe on Appeal.

[Filed Mar. 19, 1923.]

To the Clerk of the District Court of the United States, District of North Dakota, Southeastern Division:

Please include in the transcript of record on the appeal in the case above entitled in addition to the files which the appellants by their præcipe have directed to be included, the following:

The reply of plaintiffs to the answer of the defendants and any other pleadings in said action, if any other have been filed herein; the dates of filing the complaint, the answer to order to show cause, and the reply; any order extending the time to answer, if any has been made or filed; if no other pleadings, then those enumerated in the defendants' and this præcipe, are on file, and no order has been filed extending the time to answer herein, then your certificate to such facts. Lancaster, Simpson, Junell & Dorsey, H. A. Libby, Attorneys for Plaintiffs, 630 First National-Soo Line Building, Minneapolis, Minnesota.

(Title of Case.)

STATE OF MINNESOTA,
County of Hennepin, ss:

David F. Simpson, being first duly sworn, states that on the 16th day of March, A. D. 1923, he served the foregoing præcipe upon Seth W. Richardson, one of the attorneys for the defendants above

named by mailing a true and correct copy thereof at the City of Minneapolis, State of Minnesota, to said Seth W. Richardson at his office in Fargo, North Dakota. David F. Simpson.

Subscribed and sworn to before me this 16 day of March, 1923. Robert Driscoll, Notary Public, Henn. Co., Minn. (Seal.) My commission expires Feb. 9th, 1929.

[File endorsement omitted.]

76½ In United States District Court.

(Title of Case.)

Defendants' Præcipe on Appeal.

[Filed Mar. 21, 1923.]

Please include and incorporate into the transcript of the record on the appeal in the case above entitled, the complaint, the plaintiffs' application for temporary or interlocutory injunction as prayed for in the complaint, the answer, all affidavits, the order appealed from, the assignments of error, the petition for an order allowing appeal, the order allowing and fixing bond on appeal, bond on appeal, citation and proof of service thereof and this præcipe. Geo. F. Shafer, Attorney General; Seth W. Richardson, Special Assistant Attorney General, Attorneys for Appellants.

[File endorsement omitted.]

Due and personal service of the within præcipe is hereby admitted this 13th day of March, 1923, by delivering of copy at ——. Lancaster, Simpson, Junell & Dorsey, Attorneys for Plffs.

77 In United States District Court.

(Title of Case.)

Stipulation as to Exhibits.

[Filed Mar. 21, 1923.]

It is hereby stipulated by and between the above named parties thru their respective attorneys that Exhibits "A," "B" and "C" attached to, and made a part of defendants' original answer to the order to show cause in the above entitled action are so-called Service and Regulatory Announcements issued by the office of the Secretary of Agriculture under the authority of the United States Grain Standards Act and that the material parts of such exhibits are as follows, to-wit:

Exhibit "A." Service and Regulatory Announcement #36.—That part of the first cover page ending with the line "Comparison of present and revised official standards;"

Page 2 down to the heading "Results of Weight Grading under Federal Grain Supervision;"

Pages 9, 10, 11 and that part of Page 12 preceding the line "Revised Weight Standards Effective July 15, 1918."

Exhibit "B." Service and Regulatory Announcement #48.—The first or cover page and Page 2.

Exhibit "C." Service and Regulatory Announcement #54.—The first or cover page and Page 2.

It is stipulated that the Clerk of the above entitled Court
78 need not transmit as a part of the record in the above entitled action any portions of said Exhibits "A," "B" and "C" except those portions stated in the foregoing stipulation, this stipulation being made to avoid the necessity of transmitting and thereafter printing unnecessary matters. Lancaster, Simpson, Junell & Dorsey, Attorneys for Plaintiffs. Geo. F. Shafer, Seth W. Richardson, Attorneys for Defendants. Dated March 16, 1923.

[File endorsement omitted.]

79 In United States District Court.

(Title of Case.)

Petition for Appeal.

[Filed Mar. 21, 1923.]

Petition for Appeal, under Section 266 of the Judiciary Code, from an Order Granting Plaintiffs' Application for an Interlocutory Injunction.

Your petitioners, George F. Shafer, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and Fay Harding, as the Board of Railroad Commissioners of the State of North Dakota, in the above entitled cause respectfully represent and show that in said cause pending in the United States District Court in and for the District of North Dakota, Southeastern Division, there was entered on January 5, 1923, at the May, 1922, Term of said Court, an order granting plaintiff's application for an interlocutory injunction, as prayed for in its complaint in said suit, which application was heard by three judges in accordance with the provisions of Section 266 of the Judiciary Code, and which order is greatly to the prejudice and injury of your petitioners, and is erroneous and inequitable.

Wherefore, in order that your petitioners may obtain relief in the premises and for opportunity to show the errors complained of, your petitioners pray that they may be allowed an appeal in said cause to the Supreme Court of the United States, agreeably to the statutes and rules of the court in such case made and provided, and that proper orders touching the security required of them be made. George F. Shafer, Attorney General; Seth W. Richardson, Special Assistant Attorney General, Solicitors for the Defendants. Frank Milhollan. C. W. McDonnell. Fay Harding.

80 In United States District Court.

Order Allowing Appeal.

[Filed Mar. 21, 1923.]

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States and other Judges who heard said application:

It is ordered, that the appeal be allowed as prayed for in the above and foregoing petition, and that the amount of the bond on appeal for damages and costs to be given by defendants to plaintiffs be and the same is hereby fixed at ten thousand dollars. Wm. S. Kenyon, Judge.

Indorsed on back as follows: "(Title of Case.) Petition for Appeal and Order Allowing Same. Due and personal service of the foregoing petition for appeal is hereby admitted this 13th day of Mch., 1923, by delivering of copy at ——. Lancaster, Simpson, Junell & Dorsey, Attorneys for Plffs.

[File endorsement omitted.]

81 In United States District Court.

(Title of Case.)

Assignments of Error.

[Filed Mar. 21, 1923.]

Comes now the appellants, George F. Shafer, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and Fay Harding, as the Board of Railroad Commissioners of the State of North Dakota, and say that there is manifest error in the record of the proceedings and the order entered in the above entitled action, at the May, 1922, term of said Court, on the 5th day of January, 1923, in this, to-wit:

1. The Court erred in granting plaintiffs' application for an interlocutory injunction as payed for.

2. The court erred in not denying plaintiffs' application for an interlocutory injunction.

Wherefore, the defendants and appellants pray that said order and decree of said court be in all things reversed, and that a decree be entered in favor of the defendants herein, together with thir costs, and such other and further relief as may be just and equitable. Geo. F. Shafer, Attorney General; Seth W. Richardson, Special Assistant Attorney General, Solicitors for Defendants and Appellants.

Indorsed on back as follows: (Title of Case.) Spec. of Errors. Due and personal service of the within Spec. of Errors is hereby ad-

mitted this 13th day of March, 1923, by delivering of copy at —— Lancaster, Simpson, Junell & Dorsey, Attorneys for Plffs.

[File endorsement omitted.]

82 In United States District Court.

(Title of Case.)

Bond on Appeal.

[Filed Mar. 21, 1923.]

An appeal to the Supreme Court of the United States having bee allowed herein by the United States District Court for the District North Dakota on the 1st day of March, 1923, conditioned upon th execution of a good and sufficient supersed-as bond, in th
83 sum of $500.00 Dollars, George F. Shafer, as Attorney Ge eral of the State of North Dakota, and Frank Milhollan C. W. McDonnell and Fay Harding, as the Board of Railroad Com missioners of the State of North Dakota, in our official capacities indicated, as principals, and Dakota Trust Company, a North D kota Corporation, of Fargo, as surety, do bind ourselves and our su cessors in office in the sum of $500.00, to be paid to the appelle herein, above named, their heirs, successors and assigns.

Signed, sealed and dated this 12th day of March, 1923.

Whereas the above named George F. Shafer, as Attorney Gener of the State of North Dakota, and Frank Milhollan, C. W. McDon nell and Fay Harding, as the Board of Railroad Commissioners the State of North Dakota, have perfected an appeal to the Suprem Court of the United States to reverse the order and decree made an rendered in the above styled suit by the United States District Cou of North Dakota on the 5th day of January, 1923.

Now, therefore, the condition of this obligation is such that if th above named George F. Shafer, as Attorney General of the State North Dakota, Frank Milhollan, C. W. McDonnell and Fay Har ing, as the Board of Railroad Commissioners of the State of Nort Dakota, shall prosecute said appeal successfully, the same shall b void, otherwise the said obligation shall be and remain in full for and effect for the purpose of indemnifying the appellees herei above named, for all damages and costs sustained by reason of sa appeal. Geo. F. Shafer, Attorney General, State of North Dakot and Frank Milhollan, C. W. McDonnell, Fay Harding, Board Railroad Commissioners of North Dakota, Principals. Dakota Tru Company, Surety, by A. A. Lorshbough, President. Attest: M. Kennedy, Sec'y.

Attest: J. H. Calderhead, Secretary, by C. A. Hagen, Asst. Sec'y

84 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 10 day of March, 1923, before me personally appeared George F. Shafer, as Attorney General of the State of North Dakota, to me known to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same. Margaret W. Page, Notary Public, Burleigh County, North Dakota. (Seal.) My Commission expires Jany. 11, '28.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 10 day of March, 1923, before me personally appeared Frank Milhollan, as one of the members of the Board of Railroad Commission of the State of North Dakota, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same. Celia A. Hagen, Notary Public, Burleigh County, North Dakota. (Seal.) My Commission expires Feby. 5, 1929.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 10th day of March, 1923, before me personally appeared C. W. McDonnell, as one of the members of the Board of Railroad Commission of the State of North Dakota, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same. Celia A. Hagen, Notary Public, Burleigh County, North Dakota. (Seal.) My Commission expires Feby. 5, 1929.

85 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 10 day of March, 1923, before me personally appeared Fay Harding, as one of the members of the Board of Railroad Commission of the State of North Dakota, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same. Celia A. Hagen, Notary Public, Burleigh County, North Dakota. My Commission expires Feby. 5, 1929.

STATE OF NORTH DAKOTA,
County of Cass, ss:

On this 12th day of March, 1923, before me, a Notary Public within and for the said County and State, personally appeared A. A. Lorshbough, known to me to be the President of the Dakota Trust Company, the corporation named in and which executed the foregoing instrument, and acknowledged to me that such corporation executed the same. I further certify that I have examined the By-Laws of said corporation, and find that such officer is authorized to

execute bonds and undertakings on behalf of said corporation. Evelyn J. Westlund, Notary Public, Cass County, North Dakota. (Seal.) My Commission expires Sept. 7, 1927.

Indorsed on back as follows: "(Title of Case.) Due and personal service of the within Bond on Appeal is hereby admitted this 13th day of March, 1923, by delivering of copy at ——. Lancaster, Simpson, Junell & Dorsey, Attorneys for Plffs.

[File endorsement omitted.]

86 District Court of the United States, District of North Dakota, Southeastern Division.

Citation and Service.

Farmers Grain Company of Embden, Farmers Elevator Company of Wimbledon, Berwick Farmers Grain Company, Grandin Farmers Grain Company, Hampden Farmers Elevator Company, Walhalla Cooperative Elevator Company, Glenfield Cooperative Association, Farmers Cooperative Elevator Company of Cando, Benedict Farmers Cooperative Elevator Company, Farmers Elevator & Mercantile Company of Rogers, Cayuga Farmers Elevator Company, Lybeck Grain Company, I. L. Berge Elevator Company, Regan & Lyness Elevator Company, Kensal Farmers Elevator Company, Chamley Bros. Grain Company, Gwinner Farmers Grain Company, Freeborn Elevator Company, Hazen Grain Company, Eldridge Farmers Elevator Company, Carrington Grain Company, Pingree Grain Company, Farmers Grain Company, Cargill Elevator Company, Occident Elevator Company, corporations organized and existing under and by virtue of the laws of the State of North Dakota; W. M. Noddings, doing business as the Noddings Grain Company; L. L. Kruchten, doing business as the Perth Elevator; J. C. Smith, doing business as Alexander Grain Company; F. M. Cook, doing business as the Woodworth Grain Company; John A. Aird, Alexander Harchanko, doing business as the Independent Elevator Company; Robert Fleming, James Whelan, Pierce Blewett, doing business as the Star Elevator Company; Hans Neilson, doing business as the Elk Valley Farms Company; E. H. Ray, Arnold Bros., C. H. Sheldon, Louis Gjere, doing business as the Cando Grain Company; Schilling & Kruger, O. B. Sorenson, V. W. Steele, doing business as Jud Elevator Company; John Southall, J. A. Frank, H. C. Sorenson, doing business as the Independent Elevator Company; John Bibelheimer, doing business as the Washburn Grain Company; N. O Parsons, doing business as the Independent Grain Company; A. C. Andrews, doing business as the Andrews Grain Company, all in the State of North Dakota; and Acme Grain Company, Atlantic Elevator Company, George C. Bagley Elevator Company, Columbia Elevator Company, Dodge Elevator Company, Empire Elevator Company, Great Western Grain Company, Imperial Elevator Company, Miller Elevator Company, Minnekota Elevator Company, Monarch

Elevator Company, National Elevator Company, Nortland Elevator Company, Osborne-McMillan Elevator Company, Powers Elevator Company, Rugby Elevator Company, St. Anthony & Dakota Elevator Company, Victoria Elevator Company, Winter-Truesdell-Ames Company, Woodworth Elevator Company, and International Elevator Company, corporations organized and existing under and by virtue of the laws of the State of Minnesota, Plaintiffs,

vs.

GEORGE F. SHAFER, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and Fay Harding, as the Board of Railroad Commissioners of the State of North Dakota, Defendants.

87 United States of America to the Farmers Grain Company of Embden, Farmers Elevator Company of Wimbledon, Berwick Farmers Grain Company, Grandin Farmers Grain Company, Hampden Farmers Elevator Company, Walhalla Cooperative Elevator Company, Glenfield Cooperative Association, Farmers Cooperative Elevator Company of Cando, Benedict Farmers Cooperative Elevator Company, Farmers Elevator & Mercantile Company of Rogers, Cayuga Farmers Elevator Company, Lybeck Grain Company, I. L. Berge Elevator Company, Regan & Lyness Elevator Company, Kensal Farmers Elevator Company, Chamley Bros. Grain Company, Gwinner Farmers Grain Company, Freeborn Elevator Company, Hazen Grain Company, Eldridge Farmers Elevator Company, Carrington Grain Company, Pingree Grain Company, Farmers Grain Company, Cargill Elevator Company, Occident Elevator Company, corporations organized and existing under and by virtue of the laws of the State of North Dakota, W. M. Noddings, doing business as the Noddings Grain Company, L. L. Kruchten, doing business as the Perth Elevator, J. C. Smith, doing business as Alexander Grain Company, F. M. Cook, doing business as the Woodworth Grain Company, John A. Aird, Alexander Harchanko, doing business as the Independent Elevator Company, Robert Fleming, James Whelan, Pierce Blewett, doing business as the Star Elevator Company, Hans Neilson, doing business as the Elk Valley Farms Company, E. H. Ray, Arnold Bros., C. H. Sheldon, Louis Gjere, doing business as the Cando Grain Company, Schilling & Kruger, O. B. Sorenson, V. W. Steele, doing business as Jud Elevator Company, John Southall, J. A. Frank, H. C. Sorenson, doing business as the Independent Elevator Company, John Bibelheimer, doing business as the Washburn Grain Company, N. O. Parsons, doing business as the Independent Grain Company, A. C. Andrews, doing business as the Andrews Grain Company, all in the State of North Dakota, and Acme Grain Company, Atlantic Elevator Company, George C. Bagley Elevator Company, Columbia Elevator Company, Dodge Elevator Company, Empire Elevator Company, Great Western Grain Company, Imperial Elevator Company,

Miller Elevator Company, Minnekota Elevator Company, Monarch Elevator Company, National Elevator Company, Northland Elevator Company, Osborne McMillan Company, Powers Elevator Company, Rugby Elevator Company, St. Anthony & Dakota Elevator Company, Victoria Elevator Company, Winter-Truesdell-Ames Company, Woodworth Elevator Company, and International Elevator Company, corporations organized and existing under and by virtue of the Laws of the State of Minnesota:

You and each of you are hereby notified that in a certain cause in equity in the United States District Court for the District of North Dakota, Southeastern Division, wherein you are plaintiffs, and George F. Shafer, as Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell, and Fay Harding, as the Board of Railroad Commissioners of the State of North Dakota, are the defendants, the said defendants have prayed for an appeal to the Supreme Court of the United States from the order in said cause entered January 5, 1923, granting plaintiffs' application for an interlocutory injunction in said cause, and that such appeal has been allowed;

Wherefore, you are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within sixty days from the date hereof, to show cause, if any there be, why the order appealed from should not be reversed and set aside, and relief be granted to said appellants as by *it* prayed for and as to justice and equity may appertain.

Witnesseth: Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 1st day of March, 1923. William S. Kenyon, Judge.

89 [File endorsement omitted.]

Due and personal service of the within citation is hereby admitted this 13 day of March, 1923 by delivering of copy at ——. Lancaster, Simpson, Junell & Dorsey, Attorneys for Plffs.

[File endorsement omitted.]

90 **Clerk's Certificate.**

UNITED STATES OF AMERICA,
District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the United States District Court for the District of North Dakota, do hereby certify and return that the foregoing pages, from 1 to — contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk, and the whole thereof, and the endorsements thereon, in the case of "Farmers Grain Company of Embden, et al., Complainants, versus George F. Shafer, as Attorney General of the State of North Dakota, et al., Defendants."

Witness my hand and seal of said United States District Court at Fargo, this 23rd day of March, A. D. 1923. J. A. Montgomery, Clerk, by E. R. Steele, Deputy. [Seal United States District Court, North Dakota.]

Endorsed on cover: File No. 29,508. North Dakota D. C. U. S. Term No. 958. George F. Shafer, as Attorney General of the State of North Dakota, and Frank Milhollan et al., as the Board of Railroad Commissioners of the State of North Dakota, appellants, vs. Farmers Grain Company of Embden, Farmers Elevator Company of Wimbledon, Berwick Farmers Grain Company, et al. Filed April 2d, 1923. File No. 29,508.

Supreme Court of the United States

THE FARMERS GRAIN COMPANY OF EMBDEN, a Corporation, et al., *Plaintiffs and Respondents,*

vs.

GEO. F. SHAFER, AS ATTORNEY GENERAL, ET AL., *Defendants and Appellants.*

NOTICE OF MOTION.

To the above named plaintiffs, and to H. A. Libby, and William A. Lancaster, David F. Simpson, John Junell and James E. Dorsey:

Take notice, that the above named defendants and appellants, by their solicitors, will move the Court on April 2nd, 1923, at the opening of the Court, or as soon thereafter as counsel can be heard, for its order advancing the above entitled cause, the motion so to be made, and the affidavits in support thereof, being hereto attached.

Dated March 27th, 1923.

GEO. F. SHAFER,
Attorney General of the
State of North Dakota.

SETH W. RICHARDSON,
Special Assistant Attorney General
of the State of North Dakota,
Solicitors for Appellants.

(Title of Cause.)

MOTION.

Now comes the above named defendants and appellants, by their solicitors, Geo. F. Shafer, Attorney General of the State of North Dakota, and Seth W. Richardson, Special Assistant Attorney General of the State of North Dakota, and move this Honorable Court for an order advancing upon the calendar of the above entitled court the hearing of said cause to as early a date as the Court shall deem proper.

This motion is made upon the annexed affidavit of R. A. Nestos, Governor of the State of North Dakota, and upon all the records and files and proceedings had in said cause.

Dated March 27th, 1923.

GEO. F. SHAFER,
Attorney General of the
State of North Dakota.

SETH W. RICHARDSON,
Special Assistant Attorney General
of the State of North Dakota.

(Title of Cause.)

AFFIDAVIT OF R. A. NESTOS.

State of North Dakota, }
} ss.
County of Burleigh. }

R. A. Nestos being first duly sworn, says, that he is now and for several years last past has been

the duly elected, qualified and acting Governor of the State of North Dakota, and that as such Governor he makes this affidavit in connection with the application of the above named defendants and appellants to the Supreme Court for an order advancing the time of hearing of the above entitled cause to an early date.

Affiant further states that this action involves the validity of a certain law of the State of North Dakota which was duly initiated and thereafter submitted to the voters of the State of North Dakota at the general election held November 7, 1922, and was passed at such election by a vote of 138,735 in favor, and 44,406 against, and that said Act was and is an Act entitled as follows:

> "An Act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of the same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision, and the powers and duties of the persons charged with the same; providing for licensing buyers, solicitors and warehouses handling such farm products, and making an appropriation therefor."

and by its terms known as—

"The North Dakota Grain Grading Act."

That the chief industry of North Dakota is agriculture, and the chief product thereof is wheat and other grains. That the population of the State is in the neighborhood of seven hundred thousand people, and that a very great number of such population are engaged in the raising of grain, and that

the said initiated law above referred to was enacted for the protection of the people of the State, and particularly those persons engaged in the raising of grain; that the said initiated law above referred to is the only law in the State of North Dakota authorizing and permitting the existence of State inspection of grain, and that the said initiated law was passed for the purpose of securing honest and correct grading of grain, and proper returns for valuable dockage, together with proper and sufficient bonds from elevator companies and other persons engaged in the handling of grain, together with various other provisions protecting and assisting the grain producers against fraud and overreaching; that the United States Grain Standards Act does not cover or control, and is not in effect in connection with the sale and purchase and handling of grain at the local elevator points in the State of North Dakota, and that there are no Federal inspectors of grain in North Dakota, and that the aforesaid initiated law is the only law affording or extending to the producers of grain in North Dakota any adequate protection in connection with the handling and marketing of the same.

That the said initiated law has been suspended by the interlocutory injunction heretofore issued by the United States District Court in and for the District of North Dakota, and the various officials of the State of North Dakota on whom is placed the duty of carrying out and enforcing said law, have been restrained from enforcing said law, and the said law, and all portions thereof, with one ex-

ception, are now suspended; and that the said United States District Court did on January 5th, 1923, grant to the above named plaintiffs an interlocutory injunction restraining the carrying out of the enforcement of the provisions of said initiated law, pending a trial and hearing of the said matter upon the merits, said order being issued in a suit in equity brought by the said plaintiffs against the defendants, praying for the issuance of a permanent injunction against the enforcement of the said law, and all provisions thereof, on the ground and for the reason the same is unconstitutional and void.

That the said defendants have duly appealed to the Supreme Court of the United States, as provided by law, from the said interlocutory order of date January 5, 1923, and said appeal is now pending in the above entitled court; that it is highly important for the protection, welfare and guidance of the people of the State of North Dakota, and particularly the persons engaged in the raising and marketing of grain, that the validity and constitutionality of the said initiated act be determined by the Supreme Court of the United States at the earliest possible moment, and particularly prior to the harvesting and marketing of the grain crop for 1923, and that your affiant makes this affidavit as Governor of the State, for the purpose of requesting the said Supreme Court of the United States to advance the hearing and submission of the said appeal now so pending, to as early a date as possible, in order that the final

decision of the said Supreme Court of the United States as to the validity and constitutionality of said Act may be had and filed prior ot the raising and marketing of the grain crop of North Dakota for 1923.

R. A. Nestos

Subscribed and sworn to before me this 27th day of March, 1923.

(Seal) Blanche C. Dooley

Notary Public, Burleigh County, North Dakota.
My commission expires May 22, 1928

The above named defendants, as officials of the State of North Dakota, charged with the carrying out and enforcement of the said provisions of the said North Dakota Grain Grading Act, as aforesaid, do hereby join in the said request made by the said Governor of the State of North Dakota, and do substantiate and corroborate the statements so made by the said Governor in his attached affidavit as being in all respects true and correct.

Geo. F. Shafer
Attorney General of the
State of North Dakota.

Frank Milhollan
C. W. McConnell
Fay Harding
North Dakota Railroad Commission.

(Title of Cause.)

The above named plaintiffs, by their attorneys of record, do upon behalf of said plaintiffs, request and pray the said Supreme Court of the United States to advance the said appeal for hearing at the earliest possible date, in order that the decision of the matters there involved may be made by said court at as early a date as possible, and prior to the time of harvesting and marketing the North Dakota grain crop for 1923.

Dated March 26–1923

Lancaster, Simpson, Junell & Sec

David F. Simpson

Attorneys for Plaintiffs.

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WM. R. STA

SUPREME COURT
OF THE UNITED STATES.

MAY TERM, 1923.

NO ~~xxx~~ ~~27~~ 34

FARMERS GRAIN COMPANY OF EMDEN, et al.,
Plaintiffs and Respondents,

vs.

GEO. F. SHAFER, as ATTORNEY GENERAL, et al.,
Defendants and Appellants.

Appellant's Brief.

GEO. F. SHAFER,
Attorney General,
State of North Dakota.
SETH W. RICHARDSON,
Special Ass't. Attorney General,
Fargo, North Dakota,
Attorneys for Appellants.

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SUPREME COURT
OF THE UNITED STATES.

MAY TERM, 1923.

FARMERS GRAIN COMPANY OF EMDEN, et al.,
Plaintiffs and Respondents,

vs.

GEO. F. SHAFER, as ATTORNEY GENERAL, et al.,
Defendants and Appellants.

Appellant's Brief.

STATEMENT OF FACTS.

The State of North Dakota has in general but one great commercial interest, to-wit, the production and marketing of its grain crop. The State is almost wholly agricultural, and the well-being prosperity and welfare of the State depends to a very great extent upon the financial returns from the grain crop. All of the investment of money, time and labor for the purpose of creating such crop is inevitably measured by the financial returns therefrom. The production of the crop is

individual, as well as the marketing of it, and in the last analysis, the individual stands alone in the final disposition of it.

It is at the local elevator point that the disposition of most of the grain raised is made, and it is, therefore, of the utmost importance that the maximum of protection be extended at *such marketing point* in order that the producer in particular be afforded fair treatment, and proper returns.

As is detailed in the answer to the order to show cause, the marketing of grain by the farmer is had during a short period of the year, and under circumstances affording him a minimum of opportunity for supervision of the physical sale of his crop. It is threshed on short notice, and the grain is rushed to the elevator immediately, usually by children, women, hired men, and the like, and the result has always been that the buyer at the local elevator was in peculiarly supreme control of all of the elements of the marketing of the grain.

We therefore see the vital importance of the grain-producing industry to the State of North Dakota, and also that the results therefrom to the producer are wholly dependent upon proper marketing conditions, and it therefore becomes peculiarly noticeable that the greatest industry of the State, and the necessary welfare and prosperity which should flow therefrom, is concentrated and placed in the hands of the *buyers of grain* at the *local marketing points.*

Human nature is the same in the grain business as in other lines of industry, and the result of

such uncontrolled power in the hands of the buyers of grain has resulted in a set of conditions throughout the grain-raising states which may properly be termed almost a national disgrace. Much, if not all, of the political and economic unrest through the agricultural sections of the country, particularly those largely engaged in the raising of grain, is due to the presence of evils flowing from the uncontrolled and unsupervised marketing of grain. The facts in this particular have been adverted to by the courts.

State v. Turner, 164 N. W., 925, 935.

Globe Company v. Andrew, 114 Fed., 871.

Various attempts have been made through legislation to counteract and minimize these evils. Among such attempts were grain inspection and grading laws passed in 1917, and again in 1919 by the Legislature of North Dakota.

The 1919 Grain Grading Act was a comprehensive measure covering the entire field of grain marketing, passed and enforced upon the *theory* that the same was *wholly within the absolute control of the State;* that *no part* of such marketing formed *any part* of any *interstate* transaction. The scope of this former act can be readily determined from its context, and a copy of such 1919 act is appended to this brief, and marked Exhibit A, for the convenience of the court. This 1919 Act, Exhibit A, was declared unconstitutional by the Supreme Court of the United States in the case of *Lemke, Attorney General, et al., vs. Farmers Grain Company,* 42 Supreme Court Reports, 209, the Supreme Court holding that certain provisions of

the Act, and particularly the so-called margin clause therein contained (Sub-division i, of Section 2, and Section 23, Exhibit A), constituted a direct burden on interstate commerce, and an attempt to regulate the same, and that such provisions were so interwoven in the Act that it was held the whole Act was invalid.

Following such decision, there being no session of the Legislature until January, 1923, a law was initiated, as provided by law, and was adopted by the voters at the general election in the fall of 1922, the vote upon the same being approximately three to one in favor of such law, this initiated measure known as "The North Dakota Grain Grading Act," being and is the law which is here questioned in connection with this appeal. A copy of this law is appended to this brief, marked Exhibit B, for the convenience of the Court.

II.

The plaintiffs in this bill of complaint attack the constitutionality of the North Dakota Grain Grading Law (Exhibit B), and further allege it is in conflict with the United States Grain Standards Act. A temporary restraining order was issued on December 6, 1922, and, in connection therewith, an order to show cause issued why an interlocutory injunction should not be granted restraining the enforcement of the State law pending a trial of the above entitled action on the merits. The interlocutory injunction was asked for upon the allegations of the bill alone, togeth-

er with the motion shown in the record in connection therewith. The defendants filed an answer to the order to show cause, which answer is found in the record. The hearing was had on January 5, 1923, before the Hon. W. S. Kenyon, Circuit Judge, and Hon. J. W. Woodrough, and Hon. J. D. Elliott, District Judges. At the conclusion of such hearing the Court specifically refused to make any finding in connection with the constitutionality of the law in question, and stated that in view of the fact that the Supreme Court had construed the former law, that the interlocutory order would issue solely to enable the Supreme Court to pass upon the validity of the North Dakota law in the first instance, and the Court thereupon made the order granting the interlocutory injunction found in the record, said order being entered on January 5, 1923.

On March 1 an appeal from such order to the Supreme Court of the United States was duly allowed, and the question is now before the Supreme Court upon the appeal of the defendants from the order allowing the interlocutory injunction.

As appears from the record it has been agreed between the attorneys for the parties hereto that the answer to the order to show cause, shall also stand as the answer of the defendants to the allegations of plaintiff's bill on the merits (See Reply filed).

Thereafter and about January 18, 1923, the plaintiff saw fit to file an alleged reply, which reply was expressly filed to the answer of the defendants *on the merits*, and such reply having been

served and filed several weeks *after* the issuance of the interlocutory order of January 5, herein appealed from, such reply has no proper place in the record on this appeal, but was included in the record by the clerk solely by reason of the insistence of the plaintiff's attorneys in their præcipe.

The questions then involved on this appeal are,

1. Is the North Dakota Act (Exhibit B), unconstitutional as a burden upon, or interference with, interstate commerce.

2. Is the North Dakota law invalid by reason of any conflict with the United States Grain Standards Act.

III.

Existence of Evils Should Be Presumed By the Court.

The Legislature having several times passed grain grading acts to remedy alleged abuses in connection with the marketing of grain, and the people of the State having duly passed an initiated measure at the last election, having the same general purpose, we do not understand that the fact of the existence of the evils found by the Legislature and the people to be in existence, can properly be questioned by the plaintiffs on this hearing. The existence of such abuses and evils, therefore, should be presumed.

McLean v. Arkansas, 211 U. S., 539.

Tanner v. Little, 240 U. S. 369.

It is disclosed that several times in the past the Legislature of North Dakota has passed acts for the purpose of abating alleged evils and abuses in connection with the marketing of grain. These acts culminated in the 1919 Act which was thereafter declared unconstitutional by the Supreme Court of the United States in the case of *Embden Co. v. Lemke*. Thereafter and at the general election in 1922, under the initiation laws in force in this State, the people by a vote of three to one passed the present measure. This measure is now attacked by the plaintiffs upon all the grounds and for all the reasons urged against the 1919 Act.

IV.

The Supreme Court having held the 1919 Grain Grading Act (Exhibit A), unconstitutional, it is, of course, natural that the plaintiffs herein should seek to characterize and denominate the present Act (Exhibit B), as of the same kind, nature and legal effect as the former act, in order that the inclination of the court might be at once directed toward a disapproval of the present law. We must respectfully urge the court not to be misled by such patent attempts on the part of the respondents on this appeal, because it is our contention here that there are vital distinctions between the 1919 Act, previously held to be unconstitutional, and the present Act.

The 1919 Act was a comprehensive act enacted in the then supposed full scope of the State's authority to control the purchase and sale, grading

and inspection of grain within the State of North Dakota. An examination of the provisions of that Act will fully disclose its general *inclusive, comprehensive* character. It has no reference to the Federal Act, and was in nowise dependent upon such Act.

The present Act we regard as vitally different. Guided by the decision of the Supreme Court in the *Lemké case,* above noted, the present Act has plainly been drawn with reference to the United States Grain Standards Act, and is, in its last analysis, simply an attempt on the part of the State, through inspection regulations, under the police power of the State, to assist in the full carrying out and performance of the aims and purposes of the Federal Act, in a field not entered by the Federal Act. The correctness of this position on our part is, we believe, established by an examination of the Federal Act, and the State Act.

V.

Former Act Was Exclusive of Federal Act, Present Act Is Wholly Co-operative. With the Federal Act.

Under the purview of the Federal Act, the Secretary of Agriculture has fixed grades and standards and conditions of quality for certain grains. It is the intention of said Act that all grain included within interstate commerce should be graded and inspected in accordance with the *grades* fixed by the Secretary of Agriculture under that

Act. *This is the single great purpose of the Federal Act.*

Under the 1919 Act, no attention was paid to the Federal Act, and the State claimed the right, as a part of the power of the State, to fix grades and standards and conditions of quality, and enforce the same regardless of the Federal Act.

Following the decision of the Supreme Court in the *Lemke case,* the attitude of the State, as indicated in the law now under discussion, is vitally different.

We have seen that the purpose of the Federal Act is to secure the uniform use of certain grades and standards, as fixed by the Secretary of Agriculture, and it is our contention here that the present Act is a State inspection measure, solely calculated to assist, supplement and carry out to the fullest extent thru the police power of the State, the aims and purposes of the Federal Act, for the protection and welfare of the citizens of the State, *in a field not covered by the Federal Act.*

This attitude on the part of the State is plainly approved by the language of the Federal Act in its many references to *state grading systems,* and in the provision which permits all state inspectors appointed under state inspection systems to become, *by virtue of that fact,* inspectors under the Federal Act, and in the interpretation given the Federal Act by the Secretary of Agriculture in enforcing it.

VI.

Basic Feature of State Act Is Requirement of License to Grade Grain.

An examination of the State Act discloses two major provisions:

1. A Federal or State license is required in order to entitle a person to *grade* grain.

2. When Federal grades have been established by the Secretary of Agriculture, no one shall buy grain *by grade*, unless that grain shall have *first* been graded by an inspector, licensed under *either* the State of Federal Act.

It is plain that the first of the foregoing propositions is the vital proposition, because if the person desiring to *buy* grain, be licensed to *grade* grain, no difficulty can be experienced in complying with the second provision, to-wit, that grain not officially graded, cannot be purchased by *grade*.

The vital question, therefore, in the consideration of this feature of the State Act, is whether the State is, in view of the intent and scope of the State Act, authorized to require a license either issued under State authority or under the authority of the United States, before a person is permited to engage in the *business of grading grain*.

Difference Between the 1919 Act and the Present Law.

The 1919 Act was most vitally different from

the present Act in that the 1919 Act required such license in order to either *buy* or *grade grain*, whereas the present Act simply requires a license to be authorized to *grade* grain.

Under the former State Act, a *State* license was absolutely required. Under the present Act either a State of Federal license authorizes a person to grade grain.

Under the old Act, grain buyers were made deputy state inspectors, while under the new Act they are simply required to hold a license.

Under the old Act the State made its own grades in its own right, while under the new Act the Federal grades are made obligatory.

Under the old Act, the rules and regulations made by the state inspector were wholly in control. Under the new Act, in effect, any rules and regulations made under the State Act are subordinate to rules and regulations made by the Secretary of Agriculture.

Under the old Act, a license fee was required, while under the new Act, a license is issued without charge.

Under the old Act, authority was given to the inspector to fix the margin of profit, and this clause was the most vital clause in the old Act, *and was the clause upon which the Supreme Court based the greatest part of its opposition to the State law.* Under the new law no authority is given to fix a margin, or to punish for an unreasonable margin, the power of the state supervisor being simply to investigate on that subject in order that information as to the margin may be forth-

coming for the information of all persons interested.

The result of these differences, all of which are vital in their character, is to change the State Act from a comprehensive act intending to control, in the right of the State, the entire business of the marketing of grain, to an act having as its greatest purpose the protection of the producers of grain through the *effective* installment of the grades and conditions of quality established by the Federal Act.

VII.

Vital Importance of Act of Grading Grain.

In view of the importance of the grain business and the vital dependence thereon by the entire State, and in view of the further fact that the returns to the great majority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the price for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the *grading* of the grain becomes at once manifest.

The question for consideration is, therefore, whether the requirement of a license from the Federal Government or the State, in order to carry on this vitally important business—grain grading—is, in view of the vital nature of such Act as affecting the welfare of the State, beyond the power of the State.

VIII.

It has long been held that the grain business is peculiarly affected with a public interest.

Munn v. People, 94 U. S., 135.
Budd v. People, 143 U. S., 517.
Brass v. People, 153 U. S., 391.
Cargill v. Minnesota, 180 U. S., 452.
House v. Mayes, 21 U. S., 207.
Merchants Exchange v. Mo., 248 U. S., 363.

The result of these decisions is that the existence of the public interest referred to permits the regulation of such business by the State under the police power.

It has been definitely held by the Supreme Court that the State may require a license before permitting a person to engage in the grain business, regardless of whether the grain business conducted by the particular person be intra or interstate.

Cargill v. Minnesota, 180 U. S., 452.

This case is interesting on this point. The terms of the Minnesota Act discussed in the *Cargill case* were broader and more exclusive than the provisions of the State Act here discussed. In the *Cargill case* the State Act made it "unlawful to receive, *ship,* store or *handle* grain without a license," and empowered the State Commission to make all necessary rules and regulations controlling the receipt, storage, handling and *shipment* of grain, and that such rules and regulations should have the *force of law.* The various other provisions of the State Act, (which is appended to the

Court's opinion), show the extremely comprehensive nature of the Minnnesota Act. The undisputed evidence in the case disclosed that "*all* grain of every kind and description received into, or deposited or handled in, *or shipped from the warehouse,* was purchased by it for the express purpose of acquiring, shipping and transporting it as its property solely, *to its terminal elevators in Wisconsin and Illinois,* and other points east," and had been so handled. The proof further showed that no grain whatever had been received by the Cargill Company, *which had not been thereafter duly shipped out of the state.* It was contended that the State Act interfered with interstate commerce by requiring a license from the defendant in order to *handle* and *ship* grain under the terms of the State Act. The Court denied this contention and pointed out that the issuance of the license simply had reference to the business of the defendant at its elevator and warehouse, and that to require a license under such circumstances and under the provisions of the State Act, put no obstacle in the way of the defendant either with respect to the purchase of grain or its shipment out of the State.

It seems to us that if the provisions of the Minnesota Statute making it unlawful to receive, *ship,* store or *handle* any grain, without a license, and making the rules and regulations under which the license was to be used have the force of *law,* where *all* the grain handled was for interstate shipment, did not place an obstacle in the way of the *purchase* or *shipment* of grain by the Cargill Com-

pany, that it cannot possibly be concluded here that the simple requirement of a license in order to *grade* grain, puts any obstacle in the way of either the purchase or shipment of grain on the part of the plaintiffs here, where *all* of the grain is concededly not shipped out of the State. We think, as was said in the *Cargill case,* that "in no real or substantial sense is interstate commerce obstructed by the requirement of a license."

Nor does the fact that in the North Dakota law, provision is made for the establishment of rules and regulations by the state supervisor, impose any *unlawful* rules or regulations upon the plaintiffs. As was pointed out in the *Cargill case,* "the acceptance of a license in whatever form, will not impose upon the licensee an obligation to respect or comply with any provision of the statute, or with any regulations prescribed by the State Commission, that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State, and the *valid* rules and regulations prescribed by the Commission."

Ordinarily the requirement of a license in connection with the passage and enforcement of inspection laws by the State, for the protection of the welfare of its citizens, is not regarded as a real or substantial burden upon interstate commerce, even if such inspection laws apply to articles in *interstate commerce.*

Hall v. Geiger, Jones Co., 242 U. S., 539, p. 558.

Hendrick v. Maryland, 235 U. S., 610, p. 622.
Asbell v. Kansas, 209 U. S., 251, and cases cited.

Complaint is made by the plaintiffs that the effect of the license is to place a burden on the purchase of grain freely by the plaintiffs in interstate commerce. It has long been held that in the exercise of its police power, a state has the right to pass laws in the nature of inspection measures, requiring such inspection *as a condition to the article inspected being handled or dealt in in the state.*

Sligh v. Kirkwood, 237 U. S., 52 (involving a state law forbidding the sale of unripe fruit).

Pure Oil Co. v. Minnesota, 248 U. S., 158, (requiring the inspection of oil shipped into the state before sale).

Standarn Oil Co. v. Graves, 249 U. S., 394, (enforcing a state inspection measure as against oils still in interstate commerce).

Turner v. Maryland, 107 U. S., 109, (upholding a state law requiring the inspection of tobacco before shipment or sale).

Pittsburgh v. State, 156 U. S., 590, (sustaining a state law requiring the inspection of coke before permitting the same to be sold).

Savage v. Jones, 225 U. S., 501, (permitting the inspection by the state of foods shipped into the state in interstate commerce).

The power of the state to pass inspection measures under its police power which operates upon persons and things admittedly included within the

scope of interstate commerce, is aptly illustrated by the series of cases decided by the Supreme Court, with reference to state laws forbidding the introduction of diseased livestock within the boundaries of the state, and which are held to only have an incidental and indirect effect upon commerce.

Reid v. People, 187 U. S., 137.

Asbell v. Kansas, 209 U. S., 251.

These cases are also aptly illustrative of the rule that Federal legislation on subjects included within interstate commerce, will not be held exclusive unless plainly so by the terms of the Federal act, and the right of the state to pass police measures for the protection of its citizens, is upheld in connection with matters wherein the Federal legislation is not exclusive.

The case of *Asbell v. Kansas*, cited above, also points out clearly that any supposed conflict between the State and Federal laws, is obviated by provisions in the state law accepting the exercise of the authority granted under the Federal laws,—a situation which applies most aptly in the consideration of the provisions of the State law here involved, wherein such law accepts all licenses, rules and regulations, as well as rules and conditions of quality promulgated by the Secretary of Agriculture under the Federal law.

The rules referred to and laid down in the foregoing cases just cited are all quoted with approval by the Supreme Court in its opinion in the ruling case of *Savage v. Jones*, heretofore cited.

It is not apparent wherein the present State Act differs in principle from the foregoing decisions.

If the grain in question is in interstate commerce, the State law simply acts as an inspection measure supervising the grading and inspection of such grain in connection with the marketing of the same. The requirement of a license to grade grain, and the subordinate requirement that grain cannot be purchased by grade unless duly inspected, imposes no more burden upon interstate commerce, and the right of the plaintiffs to freely deal therein, than was the case under any of the decisions above quoted, and the protection thereby afforded the people of the State is greater and more necessary than was the case in any of the cases cited.

IX.

The power of the State to require such a license may be considered under two aspects:

1. In the absence of Federal legislation on the same subject.

2. In view of Federal legislation on the same general subject.

In discussing the right of the State to pass laws in connection with the protection of its citizens, with reference to fields of operation in which Congress has not yet seen fit to act, it has long been held that state regulations calculated, in the opinion of the legislature or the people, to remedy evils and abuses supposedly existing, are valid and will be enforced.

Plumley v. Massachusetts, 155 U. S., 461.

Minnesota Rate Cases, 230 U. S., 352.
Sligh v. Kirkwood, 237 U. S., 52, p. 58.

These decisions make it clear that the State has power to pass the Act in question here, in the *absence* of congressional action covering the *whole subject* of the grain business.

IT IS CONTENDED, THEREFORE, BY THE *PLAINTIFFS*, THAT THROUGH THE PASSAGE OF THE UNITED STATES GRAIN STANDARDS ACT, THE WHOLE SCOPE OF THE GRAIN BUSINESS HAS BEEN CLAIMED BY CONGRESS, AND, THEREFORE, THAT THE STATE IS DEPRIVED OF ITS ENTIRE RIGHT TO ACT IN THE PREMISES.

In considering the right of the State to pass regulatory inspection measures, and require licenses, where there is Federal legislation on the subject, the Supreme Court has pointed out that 't the Federal Act is not, by its terms and *necessary construction*, exclusive, and does not occupy the *entire* field, that the State has a right to pass regulatory measures to protect its citizens, in connection with the propositions and fields not covered by the State Act.

Savage v. Jones, 235 U. S., 501, and cases cited therein.
Corn Products v. Eddy, 249 U. S., 427.

It remains, therefore, to be seen whether the United States Act is exclusive and covers the entire field.

X.

Is the Federal Act Exclusive?

Under the language of the Federal Act the continued existence of state grading systems is presupposed, and the state inspectors are *ipso facto* made Federal inspectors. This is pertinently shown by the situation at Minneapolis. The Federal inspectors at Minneapolis are such inspectors solely by virtue of an appointment as inspectors under the *Minnesota Law*. These so-called "Federal Inspectors" receive no pay from the Federal Government, but are paid either by the State or out of the fees charged for inspections. The actual administrations, therefore, of the Federal Act in the *only field in which it operates at all*, is almost wholly based upon the existence of *state authority* in connection with the original appointment of the persons already inspectors under state authority, who act as Federal inspectors.

In the regulations and regulatory announcements issued by the Secretary of Agriculture from time to time under the administration of the Federal Act, two things are made perfectly clear. First, that the Federal Act does not occupy the entire field; and, second, that the unoccupied field is admittedly left for the control of the State and local authorities.

For instance, in the announcement of the Secretary of Agriculture, No. 36, under date of June 26, 1918, the following language is used:

> "Inspections for the purpose of the Act are performed by grain inspectors licensed by the

secretary of agriculture. These inspectors are not employed by the Federal Government. They work either independently, or are employed by the various grain exchanges or state inspection department, and are not paid by the Federal Government. * * * Farmers shipping grain in carloads directly to terminal markets, receive the benefit of the grade assigned by licensed inspectors, while the farmers selling wheat to the local elevators do not, as a rule, have this advantage, and must accept grades assigned by the buyer or elevator man." (See Exhibit A, Record).

Again, under announcement No. 48, issued May 8, 1919, the following language is used:

"Wheat grading at Minneapolis and Duluth. When the farmer hauls his wheat to the station and sells it to the local elevator, a grade is placed upon it by the elevator manager, and not by a licensed inspector, because few inspectors are located at country points. This is true under the state grading systems, as well as under the Federal grades. * * * The department cannot, however, control the country buyers or elevator man, or the miller who buys grain on the spot. Such transactions are in intrastate and not interstate commerce. While the buyer may be using Federal grades, his grading is not under the jurisdiction of the department. If he does not assign the grades honestly, fairly and accurately, *the state officials only can reach him*" (See Exhibit B, Record).

Again, in announcement No. 54, under date of June 26, 1919:

"When the farmer hauls his wheat to a station in his own state, and sells it to the local elevator, although it is bought and paid for by grade, he is making a transaction which does not require an interstate shipment. The grade in these cases is usually placed upon

the wheat by the elevator manager. It is not then graded by a licensed inspector because the inspectors are seldom located at country points. This feature is unfortunate, but the volume of inspection work in any one country shipping point is hardly ever large enough, or continues over a sufficiently long period of time, to warrant inspectors in taking up work at such points. Therefore, the correct grading of wheat at country points is usually a matter between the farmer and the local buyer, *and is one with which the local authorities, and not the Department of Agriculture, can deal*" (See Exhibit C, Record).

Following the interpretation thus placed upon the Act by the Secretary of Agriculture and his assistants, the Supreme Court in the case of *Merchants Exchange v. Missouri*, 248 U. S., 365, specifically found that the United States Grain Standards Act was not intended to supersede state laws, but was intended to co-operate with state officials charged with the enforcement of such state laws.

We therefore suggest that, the Federal Act being plainly not exclusive, the State has full authority to pass regulatory measures in the nature of inspection regulations, for the purpose of protecting what it believes to be the general welfare of its people, with reference to matters and fields *not* covered by the Federal Act.

XI.

Matters in Which Federal Act Is Not Exclusive.

It will be at once seen that the Federal Act only operates at the great grain terminals. (See regulations above quoted). No attempt is made under the Federal Law to control the situation at the local elevator, or to put in force rules and regulations to be effective at such point.

It is plain that there are two great fields in connection with the marketing of grain, and two classes of people affected, each within its respective field.

The first great field is the local market, usually at the local elevator. This field alone concerns the actual grain growers, and at such point, in the majority of cases, all title and interest of the grain producer passes from such producer to the person or elevator company buying the grain. Once this purchase has ben completed, the interest of the producer is legally at an end. That field is completed.

The other great field is the handling of the grain at the great terminals such as St. Paul, Minneapolis and Duluth. When the grain reaches these terminals, it is, in the majority of cases, the property of the elevator company or its consignees. The producer no longer has any legal interest in it. The control of the marketing at such terminal points is simply for the protection of the elevator companies shipping it, and the consignees

receiving it, as well as ultimate consignees. This is the second and remaining great field.

The Federal Act operates only in the latter of these two fields. The first great field, which is the field which concerns alone the people of North Dakota, is plainly not within the operative purview of the Federal Act, because no attempt is made to provide for inspection at the local marketing point.

As we have seen under the language of the Federal Act, and under its interpretation by the Secretary of Agriculture and his assistants, the control of the first great field is left in the hands of state authorities. If the producer is to receive any proteciton in the first great field, it must come from *state* or *local* authority. It cannot come from *Federal* authority, because the Federal authority does not assume to enter that field.

XII.

State Requirement of Licenses to Grade Grain Operative Only Where Federal Act Is Not Exclusive.

The requirement of a license to grade grain as provided in the State Act, has reference solely to the first field above mentioned, to-wit, the local field. The requirement of this license is necessary in order that the State, as well as the Federal Government, in guarding the welfare of its citizens, may know *who* is purporting to carry on the business of *grading grain*.

As we have suggested above, the State Act is plainly based upon the Federal Act, and for the purpose of seeing that similar protection to the people of the State is given full force and effect in the first great field, in which the Federal authorities do not operate.

The State Act, therefore, requires a license issued by either the State or Federal Government in order to *grade* grain, in order that the State and Federal Government may have a means of knowing *who* is engaged in the business of grading grain, and in order that the existing evils and abuses at the local market, may be minimized by the actual securing of proper authorized *grades*, as fixed by Federal authority.

It is admitted in plaintiffs' bill upon which the interlocutory injunction is asked, that if the State Act is restrained, there will be *no* supervision or inspection of grading in North Dakota (Par. 12, Bill).

This means that the first great field will, if plaintiffs prevail, be entirely free from any supervision or enforcement looking toward the *actual giving* of Federal grades to the farmer.

Plaintiff's bill admits that in such event the grades given at the local elevator in the local field will be *different* in all probability from the grades fixed by the Federal inspectors at the terminals (Par. 15, Bill).

Considered as such an inspection measure in a field not covered by the Federal Act, in connection with particulars not included within such Federal Act, we think that the right of the State

to pass such reasonable inspection measures is clearly within the power held to be in the states under the decisions of the Supreme Court.

Savage v. Jones, supra.

Corn Products v. Eddy, supra.

It must at all times be kept in mind by the court that under the State law here involved *all* grains may be bought and sold freely, *without license or other supervision,* if they are bought by *type, kind* or *sample.* It is only when the purchaser seeks to buy grain under a *grade designation,* previously fixed by the Secretary of Agriculture, under the Federal Act, that the state law says that such grain must be first officially graded; and in order to make it reasonably certain that it shall be properly graded by someone *competent to grade,* provision is made for the supervision of such persons through the issuance of a *license,* authorizing only *competent* persons to grade grain.

It seems to us that the only possible effect of such provision is to effectuate, or put in actual operative force, the Federal grades; and since the license affords the State and its citizens information as to *who* is *grading* grain, and also enables the *qualifications* of such persons to be inquired into, the net result of such State Act is to more completely effectuate the carrying out of the benefits of the Federal Act, thereby insuring the actual use of the Federal Grades at the local market point —the point most vital to the grain producer,—a situation plainly recognized as not being covered by the Federal Act at present.

XIII.

As to License Required From Elevator Companies.

With reference to the right of the State to require a license for persons engaged in the grain business, it seems clear to us that this right has long been granted to states under the decisions of the Supreme Court in the Elevator and Warehouse cases.

Munn v. People, and other cases cited above.

As was held in the *Cargill case*, a license may be required to engage in the grain business, regardless of its *intra* or *interstate* character, and, therefore, presumably, a proper fee be charged for such a license.

Cargill v. Minnesota, 180 U. S., 452.

It is contended by the plaintiff that the fee for an elevator license required by the State Act is excessive. It may be conceded that the State could not exact an excessive fee.

Pure Oil Co. v. Minnesota, 248 U. S., 162.

Standard Oil Co. v. Graves, 249 U. S., 394.

At the same time we are clear that the license fee fixed by the State Act is not excessive. The usual elevator capacity throughout the State would be in the neighborhood of 25,000 bushels. This would require an elevator license fee of not to exceed $25.00. The fee itself is, under the terms of the Act, elastic, and the amount of one dollar for each thousand bushel capacity is the *maxi-*

mum, and it would undoubtedly be presumed that the *actual* expense and disbursement found necessary in connection with the carrying out of the provisions of the State Act would have a properly consequential effect upon the fixing of the required fee at its *maximum,* or correspondingly less.

The license fee fixed by the State Act is presumably reasonable.

Pure Oil Co. v. Minnesota, supra.

XIV.

Provision for Elevator Bonds.

The provision of the State Act requiring a bond sufficient to protect grain producers when dealing with an elevator company which does not pay cash for grain purchased, we regard as being an exceedingly valuable provision. As appears in the answer to the order to show cause, many elevator companies are obligated for grain purchased, many times more than the amount of the present bond, and it is seriously believed that many of such companies are without sufficient financial responsibility to make good in the future. It is shown that during the year 1921, many losses were sustained by grain producers in the State by reason of the inability of elevator companies to pay their obligations in full. We can see no possible way in which the requirement of the State Act in this particular can be held to be violative of any right of the plaintiffs, and no

more necessary protection to the grain producers of the State, can possibly be imagined.

Another valuable provision of the present law is Section 9 of the law (Exhibit B), providing for the furnishing of a bond by persons buying or shipping grain on credit.

A large class of persons and corporations engaged in the handling and shipping of grain, do business on credit. Naturally the grain is at once removed from the state, and at an early date disposed of at the terminals. In many cases such persons have no property or investment within the state, and in many cases where such investment and property exists, the same is heavily encumbered, and the average grain producer has no proper time, occasion or opportunity of investigating the financial responsibility of such persons and corporations. The result is that at different times in the past, *payment* for grain, previously sold on credit, *could not be had*, and the producers lost a large part, if not all, of their crop by reason thereof. Accordingly, to meet this condition, the law requires all persons, whether individuals or corporations, buying or shipping grain on credit, for profit, to file a bond with the supervisor, sufficient in amount to protect persons who have sold grain to such persons or corporations, on credit. The provisions of the act apply to all persons or corporations within the class, whether resident or non-resident. The answer to the order to show cause discloses that many losses were suffered during 1921 by reason of the inability of elevator companies and buyers to pay their obligations in full.

So exceedingly vital and valuable was this provision in the present law deemed by all persons concerned, that the court which granted the interlocutory injunction appealed from, *excepted from the terms of that order the provisions of Section 9, and, in effect, authorized and permitted the supervisor under the Act to enforce that provision, it being fully apparent to the court that such protection was vitally necessary to prevent great damage and loss in the future to grain producers.*

XV.

Dockage Clause.

An additional feature of the State Law requires consideration. The State Law requires the elevator company to either *pay* the farmer for valuable dockage taken, or to *return* such dockage to the farmer. Of course, an intelligent administration of the law would not require, in connection with the *return* of dockage to the farmer, the specific, identical dockage. An equivalent amount of similar dockage would undoubtedly be a compliance with the State law, and would in all cases result —and does so result—from a practical working out of the law. There is, therefore, no reason for the extended complaint made by the plaintiffs in their bill that the state law would require the installation of expensive cleaning machinery, etc. However, even in that event, the plaintiffs should be required to have proper machinery for

the proper conduct of their business. *Cleaning machinery* may be fully as essential as proper scales. They should not be permitted to take the farmer's dockage without compensation, simply because of a claim that they have not the *proper* cleaning machinery available. This is particularly true, since, if they cannot *return* the dockage, all they have to do is to *pay* the farmer the market price for it, that is—the price which the elevator people themselves will receive for this dock age when it is finally sold by *them*, for *their own* benefit, less, of course, transportation expense, etc.

The situation here is an anomalous one. The plaintiffs contend in their bill (Paragraph 16, Bill), that the farmer is *now* compensated fully for valuable dockage in connection with the purchase of the grain, through the claimed higher price allowed for grain containing valuable dockage. If this is *true*, plaintiffs cannot possibly be damaged by the provision in the State Law, because they would be required to do no more than they already *claim* to be doing.

We believe, however, that the real fact is entirely different. The answer here shows that during the time that the former State Law was in operation, the actual reports (and the reports were not complete), which came to the State Grading Authorities, *showed dockage paid for which ran as high as* $18,000 *from a single elevator.*

It is our belief, and, we think, the belief of the grain producers of North Dakota generally, and certainly that of the people of the state in passing

this law, that practically all of this valuable dockage has in the past (except when the former State Law was in force), been "appropriated" by the elevator companies without any compensation or payment whatsoever, and that if the present state law in that respect is destroyed, such appropriation of dockage will inevitably continue, and that such hope on the part of these plaintiffs is the *main reason* for complaint against the State Law.

We do not think that this dockage provision raises any conflict with the Federal Act. The Federal Act defines dockage, but contains no provisions with reference to a return or payment for the same. The Federal Act, therefore, was not intended to be exclusive of that subject, and under the rule laid down in *Savage v. Jones, supra*, state regulation in that regard should be upheld. It seems to us the situation is not essentially different from that disclosed in the case of *House v. Mayes*, 218 U. S. 207.

XVI.

Complaint is also made that the State Law conflicts with the United States Grain Standards Act in the following particulars:

Section 4 of the Grain Standards Act makes it *unlawful to* ship or deliver for shipment in interstate commerce, grain not inspected by a *Federal* Inspector. A second proviso of this Act provides that grain may be shipped in interstate commerce without inspection at the point of shipment by an inspector *licensed under the Act*, to or through

any place at which an inspector under the Act is located, subject to be inspected by a licensed inspector at the place to which shipped, or at some convenient point through which shipped, for inspection. It is understood by this proviso that a shipment of grain in interstate commerce would be authorized from a point in North Dakota where there was no licensed inspector under the Federal Act, to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal inspector. It is claimed that the requirement of the North Dakota law that grain cannot be purchased by grade unless it has been inspected, conflicts with this proviso of the Federal Act.

Keeping in mind the rule laid down in *Savage v. Jones,* that a construction should be adopted, if possible, which would obviate any conflict between State and Federal legislation, it seems clear to us that the provision of the Federal Act is not intended to prevent an inspection *by the State,* at the point of shipment. Let us point out that the provisions of the Federal Act refer only to the presence or absence of an inspection *by a Federal inspector.* It simply provides that inspection by a Federal inspector shall not be *necessary* in order to permit the shipment of grain. It does not even pretend to state or infer that inspection by *any person* other than a *Federal* inspector, is prohibited. If the language of the proviso is confined to its actual meaning, to-wit, inspection by a *Federal* inspector, no possible conflict can be caused between such provision and the provision of the State Law which requires an inspection of grain by

either a State or *Federal* inspector before purchase.

Particular complaint is made by the plaintiffs because of a claimed conflict between the Federal Act and the State Act because of the provision in the Federal Act that inspectors must be wholly disinterested, while under the State Act the persons grading grain are in the employ of elevator companies.

In view of the fact that the grading at the point where the State Act is operative, is done by the elevator companies themselves, *through their own employes*, we feel that the court ought to assume that such inspection and grading by "interested persons" would not, in any case, be unfavorable or antagonistic to the rights of the *plaintiffs*, the employers.

Furthermore, it is the purpose of the Federal Act to require the use of the Federal Grades in interstate commerce. It has been held that the transaction at the local elevator is an interstate transaction. It must be conceded that the Federal Act does not operate at such local point, and that it is the idea of the Secretary of Agriculture and his assistants that all supervision at such local point must be left to the state authorities. We cannot, therefore, see how there can be a conflict between the Federal Act and the State Act by reason of the supervision of grading and inspection made at the local point, simply because such actual grading is performed by an interested person, *i. e.*, an employe of the elevator company, who,

under the *present* law is not an inspector or official.

It must be borne in mind that under the *former* Act such employe was made a *deputy inspector,* while, under the *present* Act, he simply becomes a licensee empowered thereby to grade grain.

He already grades the grain; the State law simply adds the regulatory feature of a license.

Nor are we impressed with the claim that the result in *a dual* inspection. It is most strenuously asserted by the plaintiffs (though denied by defendants), that the grading of grain is a simple task, and the farmer is fully competent to see that the grading is correct without the need of any assistance from the State. If this is true, it ought to be very easy for the elevator *buyer* to grade the grain correctly. If the grain is thus graded correctly, the entire purpose of the State Act is carried out. If the grain is, therefore, graded correctly, (and it must be assumed by the plaintiffs that it will be), how will the plaintiffs suffer through the administration of the State Law by reason of a claimed dual inspection, over and above the difficulties under which the plaintiffs already claim to labor, to-wit, the present act of grading *performed by their own employe*, resulting in the claimed fact that the grades allowed them by the Federal Inspectors at the terminals may be different from the grades at which the grain is now purchased (Par. 15, Bill).

The same burden is borne by the plaintiffs whether the State Law is upheld or not, since plaintiffs must *grade,* in the first instance. The

only burden that can be placed upon the plaintiffs under the State Law is in event the plaintiffs wilfully fail to grade grain *honestly*, and certainly the complaint of a *"dual"* inspection should not be permitted to place the plaintiffs in a position where they may grade grain *dishonestly*, and escape all responsibility and liability therefor, and deprive the producers of the grain of any supervised inspection at all.

XVII.

In an endeavor to carry out their plan of making the present law (Exhibit B), susceptible to the same objections sustained by the Supreme Court to the former law (Exhibit A), it is asserted by the respondents here that the present law does and is intended to empower the supervisor mentioned in the Act with authority to fix margins of profit. This contention is based upon the language in Sections 4 and 17 of the present Act (Exhibit B).

The Court will note that Section 4 provides for the duties of the state supervisor, and states that—

> "* * * he shall in a general way investigate and supervise the marketing of the same with a view of preventing unjust discrimination, *unreasonable margins of profit*, confiscation of valuable dockage, fraud, and other unlawful practices."

In Section 17 it is provided that—

> "All of the duties and obligations which were formerly performed by the state inspector of grades, weights and measures, and all

of the obligations placed upon him by law, are hereby transferred and made part of the duties of the supervisor of grades, weights and measures."

It is contended from these two sections quoted, that the present law attempts to authorize and permit the supervisor to regulate and fix margins of profit.

We made no such contention in the answer to the order to show cause, and we specifically opposed such contention in the argument in the District Court, and upon this appeal we insist that no such power is contemplated or granted by the Act to the supervisor. Section 17, properly construed, has no reference whatever to the provisions of Section 4. Section 4, in its reference to margins, is simply of a general nature, so that the supervisor may acquaint himself with the margins which are being taken in connection with the marketing of grain, in order that the public, and other persons interested, may, if necessary, be advised as to the facts. No power is given to the supervisor to fix the margin, or to in any way punish anyone by reason of the amount or unreasonableness of such margin. A comparison of Section 4, of the present Law, with Sub-division i, of Section 2, and Section 23, all of the 1919 law (Exhibit B), will disclose how far-fetched the contention of the respondents that the purpose of the two acts is identical, really is.

Section 17 of the present Act, was intended to have reference to, and has reference to certain other powers conferred by other statutes which were

placed upon the shoulders of the former inspector of grades, weights and measures, notably laws with reference to testing scales, and the like. For instance: Chapter 241 of the Laws of 1919 is a general Act for the inspection of weights and measures, including scales, and other similar devices, and creating a penalty for false scales and measures, etc.

This act is wholly separate from, and is no part of the so-called 1919 Grain Grading Law, which was declared unconstitutional by the Supreme Court in the *Lemke case*. The duties required under Chapter 241 are, by the terms of the Act, placed upon the person who *was* state inspector of grades, weights and measures, such state inspector being appointed under the provisions of the 1919 Act, known as the 1919 Grain Grading Act. With the elimination of the state inspector, by reason of the invalidity of the 1919 Grain Grading Act, it left Chapter 241 up in the air, because the person directed to enforce the Act, to-wit, the inspector, had been eliminated by the failure of the law which *created the office of inspector*. The initiated law, therefore, for the purpose of providing for a person who should enforce Chapter 241, enacted Section 17 in the present Act, so that the supervisor under the present initiated act, would assume the duties which had previously been placed upon the inspector as detailed above. This was the sole and only purpose of Section 17, and we insist that such section should be wholly confined thereto.

Furthermore, the 1919 act purporting to give the

inspector the power to fix margins was declared unconstitutional by this court in the *Lemke case* above cited. From the date of that decision, therefore, such law had no legal existence or validity, and not the slightest attempt has been made to carry out or enforce any part of it contrary to either the letter or spirit of the decision of this court.

It is familiar law that statutes previously repealed or declared unconstitutional cannot be revivified or re-enacted *by reference*, and the provisions of Section 17, even if so intended, could not by any possibility actually clothes the supervisor with any of the powers granted under the 1919 Act (Exhibit A), which had been specifically declared void by this court.

In addition to the foregoing we are entirely willing, and ask the Court to so construe the provisions of the Act under consideration, as not to grant or permit to the supervisor the power to fix margins of profit, and that the court should, if it so desires, hold any such claimed power on the part of the supervisor under and by virtue of the terms of the present Act (Exhibit B), to be unconstitutional and void.

We make no contention that the supervisor has this power. We deny that the Act extends such power to him, and we assert that no such intention is properly deducible from the provisions of the Act. It is simply a straw man created by the imagination of counsel for the purpose of enveloping the present Act within the provisions of the decision of this Court in the *Lemke case* with ref-

erence to the margin clause actually contained in the 1919 Act.

XVIII.

There is, therefore, not only no attempt to ignore the supremacy of the United States Grain Standards Act, or to resist or embarrass the rules of law laid down by the Supreme Court in the decision in the *Lemke case,* but on the other hand a plain, bona fide attempt by the State of North Dakota to co-operate with the Federal Act and to yield to the points of invalidity established by the decision of the Supreme Court. The result is, in our humble opinion, a wholly distinct and different measure from the 1919 Act, upon a distinct and different legal basis, and requiring the application of rules of law different and distinct from those enforced by the court in the *Lemke case.* The State believes that the need for supervision of the act of grading at the local elevator point is vitally necessary to the welfare of its citizens. The field covered is not touched by the operation of the Federal Act, and the provisions of the State Act are plainly on their face intended to carry out the main object of the Federal Act in a field where the Federal Act does not operate.

XIX.

In our foregoing discussion we have pointed out, as we believe the fact to be, that the present State Act here in question, was passed as a regulatory

measure under the police power of the State, in connection with the supervision of the grading of grain in a field in which the Federal Act is not exclusive, and that within such field, even though such field be interstate, no real or substantial burden or interference is had with or upon interstate commerce.

Outside of this contention we believe it proper to suggest to the Court that under the provisions of the decision of this Court in the *Lemke case*, the provisions of the present law with respect to the supervision of grading of grain at local elevator points, are not within the field of interstate commerce, and take place and are in full effect in a field absolutely within the sole power and control of the state. We shall discuss this contention as briefly as possible.

XX.

In the opinion of the Supreme Court in the *Lemke case*, various provisions of the 1919 North Dakota law were considered by the Supreme Court. Among these provisions was the provision authorizing the inspector to fix margins of profit. This provision the Supreme Court held to be a direct regulation of interstate commerce, and, therefore, invalid. In addition thereto the Supreme Court held that the right of purchase was a part of the unit of commerce. The Court thereupon said, as we view the decision, that inasmuch as all of these different provisions were involved in one complete law, that it was impossible for the Court

to separate the invalid provisions from the valid provisions; therefore, that the presence of the provisions found invalid, would invalidate the entire law.

The Court in the *Lemke case* did not specifically or inferentially hold that the act of *grading* grain was apart of any unit of interstate commerce. The Court did not hold in that decision, as we read it, that any Act which *preceded the purchase* of the grain, formed any part of interstate commerce. Under the 1919 Act (Exhibit A), Section 14 prohibited any person from *buying* grain, unless licensed as a deputy inspector under the State Law.

By reason of these provisions, therefore, involved in one complete law, as the Court found, the entire law was declared invalid.

As we have pointed out to the Court heretofore, the vital provision of the present law is that grain must be *inspected* and *graded before sale,* by someone having a *license* to *grade.* Such person may be licensed to grade grain either by the Federal authorities or by the State authorities, but the grain must be graded by someone before it can be purchased *by grade. The section then provides that grain may be purchased by sample or type, without the necessity of any license whatever,* provided it is not purchased by *grade.* It is plain, therefore, that the vital point under the present act is the *grading* of the grain by a person licensed to grade grain. In other words, the grading of grain by a person who has convinced either the State or Federal authorities that he knows enough to grade

grain to be entitled to perform such a vitally important duty.

All that the farmer has is his crop. All the returns for his years' work and labor must come from the crop. The returns are directly based upon the grade placed upon his grain. It is impossible, therefore, to appreciate any act more directly affecting the prosperity and welfare of the people of the State than the grading of grain. Before a person is entitled to grade grain, therefore, he must convince the authorities, either State or Federal, as to his ability and experience, and is then granted a license without charge.

It is important then, we believe, for the Court to clearly understand that the act of grading, including all of the details in connection therewith, is always and essentially prior to the purchase of grain. The purchase may immediately follow the act of grading, or it may not. It is neither essential nor necessary that it should. The purchase of the grain is entirely distinct from the act of grading. Indeed, the act of grading may be entirely separate from the act of purchase, and the grain may be graded without any intention of sale at all, but simply for the purpose of storage, transfer, certificate, etc. In any case the act of grading necessarily antedates the purchase by the buyer and the sale by the purchaser. So that even if the Court adheres to the rule that the act of purchase is a part of the unit of interstate commerce, such decision by the Court has no effect and is not applicable to the question as to wheth-

er the act of grading grain is or is not included within the unit of interstate commerce.

That our contention in this respect is correct, is conclusively established, we think, when we consider the fact that a very large portion, if, indeed, not the larger portion of the grain delivered at the local elevator by the farmer, is not sold at all, in the first instance, but is delivered for storage purposes. Of course, in order to properly designate such grain delivered for storage only, it would be necessary to *grade* it first in order that the storage ticket should accurately define the grade of the grain so stored. So that we have in all of such instances specific illustrations of the undeniable fact that the act of *grading* is wholly separate and distinct from the act of *purchase*, and that the act of grading does not imply purchase as a necessary result, so that since the act of grading is a necessary act not based, as a matter of fact, upon the question of purchase, it should be considered as wholly distinct from the purchase, and, necessarily, as prior thereto, so that it should not be held to be any part of the union of interstate commerce, because the inception of such interstate commerce has not yet been had.

It has been long held by this Court that interstate commerce had its inception with the delivery of the commodity to a common carrier for shipment outside the state, and that the intention of parties to thereafter ship in interstate commerce did not envelope the commodity with the character of an interstate shipment prior to the delivery to such common carrier.

We have, therefore, the situation where grain raised in North Dakota, harvested and taken to the local elevator point, by the producer, and still the sole property of the producer, is required by the State, if it is to be sold by *grade,* or if it is to be stored, *without sale,* to be first graded by some one licensed and qualified to grade, by either the State or Federal authorities. Does not such a provision operate and have its full effect while the grain is still within the exclusive control and jurisdiction of the State authorities? Does not the State Act requiring the grading of grain before sale, if the subsequent sale is to be made by grade, where, indeed, the grain may be and largely is, stored without sale, apply only to property wholly intrastate, and entirely within its own jurisdiction? True, the wheat is harvested and taken to the local elevator to be subsequently stored or sold. The State Act simply says in effect, that before it can be sold or stored, by *grade,* it must be properly graded. The necessity for proper grading is, as we have shown, apparent at once, and the necessity is a vital one. Even after the grain is graded, the farmer, for any reason which may seem sufficient to him, could refuse to proceed further, store the grain, or sell and dispose of the grain, elsewhere, and thus prevent the buyer from buying the same. In short, we submit that the act of *grading* is wholly distinct from that of *purchase,* and is to be applied under the State Law prior to purchase, and at a time when the grain remains in the sole control of the State.

This contention, we respectfully submit, does no

violence, and is not in opposition to the decision of this Court in the *Lemke case,* the Court there having in mind a statute which forbade the *purchase* of grain by any person who did not hold a license as *deputy state inspector,* and a statute which further attempted to confer upon the inspector the power to regulate thereby indirectly fixing the price of grain and fix margins of profit.

We are pursuaded that this case is ruled by the decision of the Supreme Court in the case of *Heisler v. Thomas Colliery Co.,* 43 Sup. Ct. Rep., 83, decided Nov. 27, 1922, wherein the State of Pennsylvania sought to tax antharacite coal *when the coal is ready for shipment or market.* True, the *Heisler case* was a tax case, but the question which the Court seems to consider in that decision was whether anthracite coal, ready for shipment or market, but which had not actually been delivered to a common carrier for shipment, was or was not "governed exclusively by the domestic law," or whether it had "begun to be governed and protected by the national law of commercial regulation." In determining this point the Court disposed of the contention that the fact that "the products of a state have, or are destined to have, a market in other states." that therefore the same became subjects of interstate commerce, though they had not moved from the place of their production or preparation. The Court says:

> "If the possibility or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow

> that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries. It would nationalize and withdraw from state jurisdiction, and deliver to Federal commercial control, the fruits of California and the South, the wheat of the west and its meat, the cotton of the south, the shoes of Massachusetts, and the woollen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet on the hoof, wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for, and shortly to be exported to states other than those of their production."

Without wishing to burden the Court by further discussion on the point, if anthracite coal, ready for shipment or market, is within the *exclusive control* of the State, because the "final movement for transportation from the state" had not begun, does not the same situation apply to wheat also "ready for shipment or market," which has not yet been sold, which may never be sold, and which, before it can be sold or stored without sale by grade, must have such grade fixed by some properly competent person Is not the wheat, at this point, as well as the coal, still within the exclusive jurisdiction of the state, and even if the right of purchase be held to be a part of the unit of interstate commerce, does not the fact that the purchase must come (if it shall indeed come at all), subsequent to the grading of the wheat, if the wheat is purchased by grade, show that at the time the act of grading is to be performed, to-wit,

while the grain is still in the farmer's own wagon, his own property, and subject to such disposition, as he wishes to make of it, conclusively demonstrate that the act of grading takes place at a time prior to the inception of any part of the unit of interstate commerce? Otherwise, when does the interstate unit with respect to wheat begin? Does it begin when the farmer has threshed the wheat, or when he has loaded it into his wagon, or when he is on the way to the elevator with it? Does it begin when he comes in sight of the elevator, or when he submits it to the grader to be graded? Does it begin when he decides to store it, or not to store it. It has always seemed to us that the wheat does not lose its intrastate character until it has been delivered to the common carrier for shipment, either by the farmer, the elevator company, or the purchaser. Of course, it must be also observed by the Court that even though the grain is purchased by the elevator company, the option still remains with the elevator company whether they will hold it, sell it locally, ship it to other points in the state, or ship it outside of the state; and, as the Supreme Court said in the *Heisler case, supra,* the mere intention to thereafter ship in interstate commerce, even though embracing the entire production, has nothing to do with the inclusion of the commodity within the protection of interstate commerce.

XXI.

We submit that the decision in the *Lemke case* does not and is not intended to, hold that the act of *grading* is included within the unit of interstate commerce, and that the present State Act here complained of is pointed solely toward the *proper* performance of the act of *grading*, and that such act of *grading* takes place *before* the act of *purchase*, and while the grain is still in the exclusive control of the state, just the same as was the case with anthracite coal in the *Heisler case*.

Of course, it follows, if our contention is sound, that the present law would be upheld by this Court, because it would then be held to be operative within a field in which the state had exclusive authority, to-wit, prior to the commencement of interstate commerce.

XXII.

In conclusion, therefore, we respectfully contend:

1. That the North Dakota Grain Grading Act (Exhibit B), is a police measure, enacted by the State of North Dakota for the protection of the welfare, happiness and prosperity of its citizens, and that it places upon interstate commerce no real or substantial burden or interference.

2. That the State Act is intended to be cooperative with the Federal Grain Standards Act, by effectuating the establishment and promulgation of the United States Grain Standards Act grades and standards, at the local elevator point, an evil at present not covered by the administration of the Federal Act, but one which is left to the local or state authorities.

3. That, properly construed, the North Dakota Act does not conflict with the United States Grain Standards Act, but is harmonious thereto, and co-operative therewith.

4. That the provisions of the State Law requiring a license to grade grain, such license to be issued by either the Federal government or the State government, operates and takes effect while the said grain is wholly within the domain of State authority, and prior to the inception of the unit of interstate commerce in any particular.

The District Court in allowing the interlocutory injunction, specifically declined to pass upon or express any opinion as to the constitutionality or unconstitutionality of the present Act. The act of the District Court, therefore, in issuing the interlocutory order, creates no presumption against the validity of the law. The determination of the questions involved on appeal are essentially questions of law as based upon the construction of the provisions of the statute at issue. The submission, therefore, of such questions upon appeal from the interlocutory order is not only proper but advisable.

We therefore respectfully submit that the North Dakota Grain Grading Act should be declared valid and constitutional, and the order granting the interlocutory restraining order should be reversed and set aside.

Respectfully submitted,

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EXHIBIT "A".

"Sec. 1. The Governor of the State of North Dakota, on or before the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the state inspector of grades, weights and measures, who shall receive, with the approval of the state board of regents, the sum of one thousand dollars per annum.

Sec. 2. The state inspector of grades, weights and measures shall have the power and is hereby directed:

(a) To appoint a chief deputy state inspector of grades, weights and measures; a chief elevator accountant; deputy insnector of grades, weights and measures; state deputy inspector of grades, weights and measures, and warehouse inspectors;

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(e) To hear and determine appeals from the decision of state deputy inspectors and from deputy inspectors and from deputy inspectors of grades, weights and measures;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punish for contempt.

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this State in regard to the same, provided, that all such rules be published by the state inspector of grades, weights and measures in such manner as to give the greatest publicity thereof;

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

(j) To fix and determine all charges for grading, inspecting and weighing grain or other agricultural products;

(k) To make rules and regulations for the purpose of carrying out the provisions of this Act and to do any and all things necessary or expedient for said purpose.

Sec. 3. It shall be the duty of the inspector of grades, weights and measures to proceed at once to define and establish uniform grades and weights for grain, seeds, or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Sec. 4. The term 'deputy inspector of grades, weights and measures' within the meaning of this Act is defined as any firm, person, company, corporation or association that buys, weighs and grades grain, seeds or other agricultural products, and holds a license issued therefor by the State inspector of grades, weights and measures.

Sec. 5. The term 'state deputy inspector of grades, weights and measures' within the meaning of this Act is defined as one who is in the employment of the State of North Dakota and has received an appointment from the state inspector of grades, weights and measures.

Sec. 6. The term 'solicitor of grain, seed and other agricultural products' within the meaning of this Act, is defined as one who engages in the business of soliciting grain, seed and other agricultural products to be sold for the benefit of the consignee or otherwise disposed of for the benefit of himself, an agent, broker or factor.

Sec. 7. The term 'public warehouse', within the meaning of this Act is defined as all buildings. elevators, or warehouses, and all grist and flour mills doing a shipping business in this State, erected or operated or which may hereafter be erected or operated by any person, association, co-partnership, corporation or trust for the purpose of buying, selling, storing, shipping or handling grain for profit.

Sec. 8. The chief deputy inspector of grades, weights and measures and chief elevator accountant shall have power and authority under the direction of the state inspector of grades, weights and measures to carry out the provisions of this Act. They shall be stationed at the North Dakota Agricultural College.

Sec. 9. State deputy inspector of grade weights and measures may be stationed by the state inspector of grades, weights and measures at any town or place where grain, seeds or other agricultural products are bought, sold, marketed, stored or manufactured. They shall have power and authority under the direction of the state inspector of grades, weights and measures to inspect, weigh and grade grain, seeds or other agricultural products at such places.

Sec. 10. It shall be the duty of deputy inspectors of grades, weights and measures to weigh, inspect and grade all grain, seeds and other agricultural products that shall be offered for sale or shipment at their market place, according to the provisions of this Act and the rules and regulations established by the state inspector of grades,

weights and measures. They shall issue a certificate stating the kind of grain, seeds, or other agricultural products, giving the grade, test-weight per bushel and the reason for all grades below Number 1, and shall deliver to the owner or agent of such grain said certificate. It shall also be the duty of said deputy inspectors of grades, weights and measures, to accurately sample grain, seeds and other agricultural products in wagon loads, carloads or other containers, and forward samples thereof to the state inspector of grades, weights and measures when instructed to do so by the state inspector of grades, weights and measures.

Sec. 11. The state inspector of grades, weights and measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products, or the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill, provided that such buyer or agent shall pass such examination as to his competency as may be prescribed by the state inspector of grades, weights and measures. The condition of such license shall require such deputy inspectors of grades, weights and measures to fix grades and dockage of grain and seeds inspected at their respective places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The state inspector of grades, weights and measures may issue a license to any person engaged in soliciting or procuring consignments of grain,

seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the state inspector of grades, weights and measures. The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the state inspector of grades, weights and measures. The state inspector of grades, weights and measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder. All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the state inspector of grades, weights and measures.

Sec. 12. The state inspector of grades, weights and measures shall collect a fee of $10.00 for each license issued under the provisions of Section Eleven of this Act.

Sec. 13. Each deputy inspector shall cause his license to be posted in a prominent and conspicuous place at his place of business and shall not be authorized to inspect, weigh or grade grain or seed in any other place except on the approval of the state inspector. Any solicitor for grain, seeds or other agricultural products shall produce his

license for examination when requested to do so by any interested person.

Sec. 14. It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a deputy inspector of grades, weights and measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products, without first procuring a deputy inspector of grades, weights and measures' license, provided, however, that this section shall not prohibit state deputy inspectors from inspecting, weighing and grading grain, seeds, and other agricultural products under the direction and supervision of the state inspector of grades, weights and measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. Any person may without a license buy any grain, seeds or other agricultural products that have been graded, inspected and weighed by a deputy inspector of grades, weights and measures, or state deputy inspector of grades, weights and measures.

Sec. 16. The state inspector of grades, weights and measures may upon the cancellation or suspension of any license issued hereunder permit the business of any licensee to be completed and finally closed under the inspection and supervision of a state deputy inspector who shall be stationed at the place of business of such licensee. All the

expenses of such inspection and supervision shall be paid by such licensee.

Sec. 17. The state inspector of grades, weights and measures shall cause the grades established hereunder to be published in not more than five newspapers of general circulation in the State of North Dakota, two of which shall be devoted to the benefits of agriculture and three shall be papers of general circulation. Such notice shall specify the date when the grades so established shall become effective, which shall be not less than thirty days in advance of such date.

Sec. 18. The state inspector of grades, weights and measures may establish central markets for the display of samples of grain, seeds or other agricultural products and may install a deputy in charge of any such central market at cities, or towns without or within the State of North Dakota. Such markets shall be open to any and all persons desiring to buy or sell on said market and shall be operated and conducted under such rules and regulations as the state inspector of grades, weights and measures may establish therefor.

Sec. 19. The state inspector of grades, weights and measures shall receive, hear and determine all appeals from the decision of all state deputy inspectors and from all deputy inspectors. All such appeals shall be heard and determined by the state inspector of grades, weights and measures under such rules and regulations as he may establish therefor, and he shall consider the flour and bread producing qualities of such grain where such final decision is necessary. It shall be the duty of

deputy inspectors of grades, weights and measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 20. It shall be the duty of all deputy inspectors of grades, weights and measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades received at terminal markets or within the State. This information shall be furnished the state inspector of grades, weights and measures upon written demand thereof.

Sec. 21. It shall be the duty of every deputy inspector of grades, weights and measures to provide proper sieves, cleaning devices for separating dockage from grain and seeds, grain tester, stroker and other tools used for the correct grading of grain and seeds.

Sec. 22. The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this State, and who does not pay cash in advance for the grain so bought shall file with the state inspector of grades, weights and measures a bond, to the State with good and sufficient sureties, to be approved by the inspector of grades, weights and measures in the penal sum of not less than five thousand dollars nor more than seventy-five thousand dollars, in the discretion of the state inspector of grades, weights and measures condi-

tioned for the faithful performance of their duties as public warehousemen and the compliance with all the laws of this State in relation thereto. Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation, and shall be in an amount sufficient to protect the holders of the outstanding grain tickets.

Sec. 23. The state inspector of grades, weights and measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products.

Sec. 24. State inspector of grades, weights and measures, shall fix and determine the compensation and bonds of the chief deputy inspector of grades, weights and measures, the chief elevator accountant, state deputy inspector of grades, weights and measures, and warehouse inspectors.

Sec. 25. The chief elevator accountant and warehouse inspectors, under the direction of the state inspector of grades, weights and measures, shall visit the public warehouses in this state for the purpose of ascertaining whether sufficient bond is in force to protect the holders of storage tickets for grain stored therein; whether such warehouse is amply protected by insurance; to ad-

vise with local managers and boards of directors as to proper methods of accounting; to assist local warehouses in making proper reports and to secure annual or other reports required by law of the state inspector of grades, weights and measures and to advise and assist warehousemen in promoting efficiency and safety in the marketing of grain; to enforce compliance with all laws relating to public warehouses, and the rules and regulations of the state inspector of grades, weights and measures. Should such accountant or any inspector find that any such warehouse has failed to provide a bond sufficient to protect the holders of storage tickets or that such institution is not amply protected by insurance or has refused or neglected to furnish any report required by law or the state inspector of grades, weights and measures, or is violating any State law or the rules and regulations of the state inspector of grades, weights and measures relating to any such institutions, such inspector shall report such condition to the state inspector of grades, weights and measures, and to the manager of such institution. Should any such institution neglect or refuse to remedy such condition, the state inspector of grades, weights and measures may suspend the license of such warehouse and if after notice and the allowance of a reasonable time to comply with the instructions of the state inspector of grades, weights and measures, such warehouse refuses to remedy such conditions, the state inspector of grades, weights and measures shall cancel the license of such warehouse.

Sec. 26. A state warehouse license must be obtained through the state inspector of grades, weights and measures for each and every public grain warehouse in operation in this State. No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. The license fee is hereby fixed at eight dollars for warehouses of a capacity of 12,000 bushels or less and ten dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and twelve dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and twenty dollars for all warehouses over 50,000 bushels and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the state inspector of grades, weights and measures shall collect from the person applying therefor the license fee required herein.

Sec. 27. The license thus obtained shall be posted in a conspicuous place in the public warehouse so licensed. Every such license shall expire on the first day of August of the odd numbered years next following the issuance thereof, and no license shall run for a longer period than two years. Any person or association that shall transact business of public warehousemen without first procuring a license as herein provided shall on conviction be fined in a sum of not less than twenty-five dollars for each and every day such business is carried on.

Sec. 28. The state inspector of grades, weights

and measures is hereby authorized to refund the license fee of a public grain warehouse or so much thereof as in his judgment would be just and reasonable when satisfactory proof is furnished to him that such warehouse or elevator has been transferred to some other person, firm or corporation and application is made by the owner for a license for the same warehouse or elevator for the same biennial period for which the original license was issued, provided, that where a warehouse or elevator is destroyed by fire or other cause, the license fee may be prorated in such amount as the state inspector of grades, weights and measures may determine.

Sec. 29. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor, and for the first offense shall pay a fine of not less than $10.00 and not more than $100.00, or be confined in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment. For each succeeding offense he shall pay a fine of not less than $100.00 or more than $500.00 or be confined in the county jail not less than thirty days nor more than ninety days, or both such fine and imprisonment.

Sec. 30. Any person who forcibly assaults, resists, inmpedes or interferes with the state inspector of grades, weights and measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen

days or more than thirty days, or both such fine and imprisonment.

Sec. 31. All money in the State treasury known as the State grading and weighing fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State inspector of grades weights and measures. All fees and licenses collected by the state inspector of grades, weights and measures shall be turned into the state public grain grading and weighing fund, and the salaries and compensation of the state inspector of grades, weights and measures, chief deputy inspector of grades, weights and measures, chief elevator accountant, and all other deputies, inspectors, accountants, experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

Sec. 32. The Sections 3101, 3102, 3103, 3105, 3109 and 3111 of the Compiled Laws of 1913 of the State of North Dakota, also Chapter 56 of the Laws of 1917 passed at the 15th session of the Legislative Assembly of the State of North Dakota, and Chapter 14 of the Laws passed at the Special Session of the 15th Legislative Assembly of the State of North Dakota for the year 1918, and all other Acts and parts of Acts in conflict with this Act are hereby repealed.

Sec. 33. Whereas there is no adequate provision of law providing for a uniform system of grading, weighing and inspecting grain in this

State therefore an emergency is hereby declared to exist, and this Act is hereby declared to be necessary for the immediate preservation of the public health, peace and safety and shall take effect and be in force from and after its passage and approval."

EXHIBIT "B".

Initiated Measure.

The North Dakota Grain Grading Act.

An act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouses handling such farm products; and making an appropriation therefor.

Be it enacted by the people of the State of North Dakota:

Section 1. For the purpose of encouraging, promoting and safe-guarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in marketing of all kinds of grain, seed and other agricultural products, we, the people of the State of North Dakota, do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The board of railroad commissioners of the State, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weigh-

ing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filled in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The state supervisor of grades, weights and measures shall maintain his office and principal place of business at the Agricultural College of this State, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College, (and especially of the State experiment mill at said College), to assist and co-operate with the state supervisor of grades, weights and measures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the state supervisor of grades, weights and measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and

supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the secretary of agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this State. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Section V. That whenever grades, weights and measures shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the state supervisor of grades, weights and measures, or by the secretary of agriculture of the United States, then no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act; provided, that any person may buy any such pro-

duct by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. The state supervisor of grades, weights and measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products, provided that such buyers, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the state supervisor of grades, weights and measures. The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded, according to the provisions of this act and the rules and regulations made hereunder.

Section VII. The state supervisor of grades, weights and measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage

without compensation. or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act. Upon such suspension or revocation, if the licensee is not satisfied with the decision of the state supervisor of grades, weights and measures, he may appeal to the District Court of his county and have such an order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the secretary of agriculture, buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. A state warehouse license must be obtained through the state supervisor of grades, weights and measures for each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the state supervisor of grades. weights and measures, and shall not exceed $1.00 for each 1000 bushels capacity of such warehouse. The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

Section IX. It shall be the duty of the supervisor of grades, weights and measures to inspect

public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the State, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this State in relation thereto.

Section X. And it shall be the duty of every public warehouseman in this State to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the supervisor of grades, weights and measures upon written request.

Section XI. In case of any dispute as to grades, weights or measures, between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product,

and shall be sent to the supervisor of grades, weights and measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the supervisor of grades, weights and measures or who does not hold a license to grade, weigh or measure grain, seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the supervisor of grades, weights and measures, provided, however, that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. To accomplish the purpose of this act, the state supervisor of grades, weights and measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary, and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the department of grain grading, shall remain within

the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the supervisor of grades, weights and measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act. And it shall be the duty of the attorney general of the state and his assistants and all of the states' attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the state supervisor of grades, weights and measures.

Section XIV. The salary of the supervisor of grades, weights and measures shall be paid out of the grain grading fund, and he shall give bond to the State in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota grain grading department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Section XVI. There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the state treasury, the sum of ten thousand dollars, together with all moneys in the state treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act

shall be turned into the state treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. All of the duties and obligations which were formerly performed by the state inspector of grades, weights and measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the supervisor of grades, weights and measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 34.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLANTS' BRIEF ON RE-ARGUMENT.

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APPELLANTS' BRIEF ON RE-ARGUMENT.

This cause was set down for re-argument by this court on March 2, 1925. No request was made for the submission of additional or supplementary briefs. On March 2nd we were presented in the Supreme Court with a brief entitled "Appellees' Brief on Re-hearing." We had no opportunity to

examine the same or to prepare any reply with reference thereto.

This additional memorandum is, therefore, prepared and submitted for the attention of the court in connection with the brief submitted by the appellees upon such re-argument. In referring, therefore, hereafter to appellees' brief reference is had to such brief upon the re-argument.

1.

Throughout such brief it is apparent that the plaintiffs have laid the greatest possible stress upon the preamble preceding the North Dakota Grain Grading Act of 1922. An attempt is made to convince the court that the language used in such preamble, is in some not clearly understood way, controlling upon the actual provisions of the act itself. It may be freely admitted that such preamble, which is in general inclusive terms, may seem broader than the provisions of the act itself. Our contention on the point is simply that the provisions of the act should in every case control as to determining the powers and scope of the act and that general recitals in a preamble to the act can neither amplify or narrow the powers provided for in the actual act itself.

2.

Much of appellees' brief is devoted to a claim that the grain business requires a uniform rule and that the provisions of the North Dakota Act

in question prevents the application of such uniform rule. Our contention is exactly the opposite. It is the condition of affairs which the plaintiffs wish perpetuated which destroys the uniformity of rule deemed necessary. Uniformity of rule simply means the providing of a definite, uniform measure for the establishment of the grades of grain. This uniform rule is established by the United States Grain Standards Act and the grades thus established having been made a part of the North Dakota Act the rule is the same covering the entire grain business under both laws. The uniform rule sought for is, therefore, established.

On the other hand, in the absence of the North Dakota Law, the state contends that the grades provided for under the United States Grain Standards Act are *not* being given to the producers at the local markets even if the grain at that point be considered to be in interstate commerce. In other words, it is claimed that under present conditions the farmer cannot obtain accurate United States Standard grades at the local markets through the nonfeasance or actual misfeasance of the persons now grading grain at such local points, The conclusion of the state and its officers that such evils exist are not properly the subject of review by this court on this appeal. We believe the proper rule requires this court to accept the decision of the state as to the fact with respect to the existence of such evils. Under present practices, therefore, there is no uniform rule actually applied in the grain business—a result directly caused by

the failure of the persons now grading grain at local elevator points to observe the directions of the United States Grain Standards Act. Such a condition, therefore, directly prevents the application of the uniform rule sought for so vigorously in appellees' argument.

In the next place, it is clear that the claim of the appellees that the existence of the State Act results in a dual inspection is equally erroneous. There is and always will be necessarily, with reference to the overwhelming majority of grain sold and purchased by grade, *two* inspections. The grain must be inspected and graded before the original purchase can take place. This is the *first* inspection. Then, at the terminal, the grain must be again inspected and graded before, or in connection with sale. This is the *second* inspection and grading. From the very nature of the case there *must always be a dual inspection of the grain.* Under the terms of the United States Grain Standards Act, under each grading and inspection, the uniform rule of grading fixed by the act is supposed to be applied. All that the State Act does is not to increase the *number* of inspections, but simply adds safeguards for the purpose of making more certain that the *first* necessary inspection shall be of the kind and character promised and fixed by the terms of the United States Grain Standards Act. The claim of the appellees that such a supervision results in a dual inspection is absurd. The *number* of inspections always remains the same, and if at the local market the persons grading

grain are really complying with the Federal Act, the supervision under the provisions of the State Act creates no additional burden. On the other hand, if such persons are not now obeying the provisions of the Federal Act, certainly the provisions of that Act or the constitutional privisions with reference to the control of interstate commerce, ought not to serve as a shield to protect them in such wrongdoing.

Nor does the contention of the appellees that the result of state supervision of grading where there is no opportunity or means provided for federal inspection of such grading, will result in an appeal to *divergent* authority, stand upon any firmer ground. In Section 7 of the United States Grain Standards Act (39 Statutes at Large 482) it is specifically provided that federal licenses shall be issued to state inspectors operating under state inspection and grading systems. The North Dakota Act here in question in Section 2 provides for the appointment of a supervisor. This supervisor is by the terms of Section 7 of the Federal Act entirely qualified as a federal inspector. In event of a dispute as provided in Section 11 of the North Dakota Law an appeal may be had to such state supervisor. It must at all times be kept in mind that such supervisor is also a federal inspector. Such appeal, therefore, not only goes to the state supervisor, *but also to a federal inspector,* and the ruling of the person who is both state supervisor and federal inspector provides an ample basis for the ultimate submission of his ruling to the sec-

retary of agriculture under the United States Grain Standards Act, because an appeal will lie from such federal inspector under the provisions of the Federal Act ultimately to the secretary of agriculture.

This point illustrates aptly the real co-operation between the Federal and State Acts and the utter absence of interference or friction. The uniting of the superior executive officer under both acts in the same person, shows clearly that the existence of the State Act helps and assists in the accomplishing of the uniform rule apparently so much sought for by these plaintiffs.

3.

We are somewhat at a loss to explain the amount of attention given to certain alleged acts of Senator Ladd with respect to certain bills introduced in congress, except upon the basis of raising possible political prejudice. The evident desire of the senator to fix a specific point where interstate commerce in grain might begin, was undoubtedly premised upon the actual fact that this court has itself stated that it was in very great doubt as to just where that point existed. Of course, upon reflection, the action had in Congress, and referred to so frequently by appellees, could have no proper application to the determination of this appeal, other than the possible reason above stated.

4.

It is suggested with some force that the intention of the Federal Act implies a desire to have inspectors who are disinterested and not connected with the grain business, commercially. It is then suggested that if the Federal Act should be amended so that inspectors at local points might be so commercially interested, such amendment might be interpreted as a reversal of policy on the part of congress. We do not believe that such a suggestion is sound. The fact that the Federal Act requires disinterested inspectors was at once interpreted by the secretary of agriculture to mean that federal inspectors should be supplied only at *terminal points,* for the obvious reason that it could not be fairly supposed that Congress intended to create some twenty-two hundred independent inspectors to cover the local market situation in North Dakota. The policy of Congress, therefore, as indicated by such a law was that the congressional legislation should occupy a *limited field,* to-wit, the field at the terminal, but that such legislation would not be exclusive and would not cover the actual inspection at local points. If, therefore, Congress by amending the act should itself provide for adequate inspection at the local elevator points through the use of interested inspectors, the reversal of policy would simply mean that Congress by such a new enactment *was intending to occupy both fields,* to-wit, the terminal field and the local markets in North Dakota. The very fact, there-

fore, that a reasonable construction of the Federal Act prevents the presence of federal inspectors in North Dakota demonstrates, it seems to us, that the Federal Act was not intended to be exclusive but was intended only to occupy a part of the field.

5.

Much attention is paid in appellees' brief to the requirement of Section 9 that a bond should be given by persons buying grain on credit. Properly considered, we do not think that such clause should present any difficulty to the court. In the first place, it is an entirely separable clause and the question of its validity or invalidity should have no effect upon the validity or invalidity of the general act itself.

In the second place we think it improper to reduce the situation to an individual transaction. It is suggested that for the state to require a bond from an individual buyer of grain on credit, where such transaction is satisfactory to his immediate vendor, is burdening interstate commerce. We do not think such a suggestion is fair. Where a multitude of such transactions result in a situation where a large number of the people of the state are victimized and defrauded of their just dues and the prosperity and welfare of the state is thereby jeopardized, we think the rights of the individual transaction should be subject to the protection of the general welfare of the greater number of people of the state. If the buying of grain on credit

has resulted in the disasters claimed, is it unreasonable to suggest that the state under its police power may interfere to prevent such a catastrophe, even if the means employed may indirectly affect interstate commerce? Must not the question of individual right yield necessarily to the general protection of the welfare of all of the people?

After all, what is the distinction between such a bond, and the bond ordinarily required from elevators and warehouses? It is recognized that the conduct of an elevator or warehouse is something which may vitally affect the prosperity of the state. The reasons for such conclusion are clearly set forth in the Cargill case (180 U. S. 452). The bond is for the purpose of protecting the general interests of the people, who by reason of the course of business must necessarily deal with elevators and warehouses. If an *individual* is engaged in the same general business, to-wit, the handling of grain, is there any reason why the same bond requirement should not be made of the individual that may concededly be made from an elevator or warehouse operator, and what difference does it make that there may be a general bond covering warehouses, and a special bond required in connection with the purchase of grain on credit? In either case, the bond is for the *protection of the people,* and it must be admitted that the need for protection in connection with the *purchase of grain on credit* is fully as great, if not greater, than the necessity of a bond in connection with *stored grain.* The operations, therefore, of the persons interested being the same,

the general purpose being the same, and the ultimate object of the bond being the same, what reasonable distinction can be made between the right to require an elevator or warehouse bond and the bond provided for in Section 9?

6.

It is further contended that the provision of the North Dakota Act, Section 4, with respect to dockage constitutes a direct interference with interstate commerce. It must be conceded, so far as this argument is concerned, that in the absence of such a clause the farmer has been deprived of his valuable dockage, and the benefit thereof has gone to the purchaser of the grain. It must also be admitted that the taking of this dockage without compensation is with the opposition of the farmer and over his objection. *We have a situation, therefore, where the buyer of grain is actually appropriating a certain portion of the farmer's product without compensation.* Can the interstate commerce clause be used as a shield for such a transaction? In *House v. Mayes,* 218 U. S. 207, this court held that the due process of law provision of the constitution would not protect the buyer of grain in Missouri in appropriating an arbitrary portion of the grain without payment and that such appropriation was in effect a taking of the farmers' property without due process of law. It has been frequently suggested by this court that the interstate commerce clause will not be permitted to shield or encourage

fraud. What other effect can the objection raised by the appellees on this point have, than to encourage and protect fraud? These plaintiffs are now appropriating this valuable dockage without compensation. They ask the assistance of this court in continuing such illegal practice. Should such protection be extended to them under the interstate commerce clause?

It is frequently suggested in appellees' brief, although there is no evidence in the record whatever on the point, that at one time a finding of a Federal Commission indicated that grain was overgraded at the local elevator point and that, therefore, the evils complained of by the state authorities did not exist. Concerning this suggestion we have this to say: In the first place, a vote of three to one in favor of the passage of the North Dakota law now in question shows that the people of North Dakota did not believe that the alleged situation reported by such commission in fact existed, but that on the other hand grain was being constantly undergraded at the local elevator point. In the second place it will be conceded that the North Dakota law is being most vigorously fought by the terminal elevator companies. If, as a matter of fact, grain was being overgraded at the local elevator points, the existence of careful inspection under the federal grades at the local point would tend to equalize such difference, *a result wholly favorable to these plaintiffs.* If the plaintiffs, therefore, were sincere in making this claim of overgrading at local elevator points, the curing of such evil should be

most acceptable to these plaintiffs, and their opposition to the law cannot possibly be explained upon the abstract theory of defending the principle of interstate commerce. The attack upon this law is a most convincing argument that the actual conditions support the claim of the state as to existing evils.

7.

A most patent attempt is made throughout appellees' brief to point out to this court that the act under consideration is an act prepared and adopted in defiance of the opinion of this court in the Lemke case. The idea probably is to arouse the indignation of this court against what is claimed to be a "brazen" attempt to evade its opinion in that case. With all the sincerity which we may express, we urge upon the court the falseness of such a proposition. We are indeed anxious to preserve for the state all of its rights to help improve conditions affecting the grain business. We do not understand that the court intended under the Lemke decision to state that the state had no power in helping to better the present grievous conditions. Our interpretation of the Lemke decision is simply that the state, by including in its act *the control of margins*, and, therefore, the actual control of prices, went beyond the police power and attempted to regulate and control, directly, interstate commerce. We have always very much doubted whether the law in the Lemke case would have been declared unconstitutional if the margin clause had

not been included in that act. *It was the inclusion of such clause which permitted the court to say that the act was a comprehensive scheme to control the buying of grain.* Without such margin clause we do not believe even that the former law constituted such a comprehensive scheme. When, therefore, as we contend, a new act is drawn which everywhere recognizes the supremacy of the federal authority, recognizes the right of federal inspectors in all particulars and provides for the administration of the act by a supervisor who is by virtue of his position also to be an inspector under the Federal Act, may we not fairly say that we have changed both the purpose, the scope and the legal relations affecting the entire situation? This result, therefore, is brought before this court in the form of the 1922 law as an earnest, sincere attempt on the part of the state to properly and legally help in the protection of its own welfare and that of its citizens.

8.

Finally, we believe the present North Dakota Act should be considered broadly and with a view to its actual effect. After all, all that the act does is to assist in making certain that the grades fixed under the United States Grain Standards Act *will actually be put in force at the local elevator point.* At present there is no local inspection; at present the farmer must take the prejudiced judgment of the employes of these plaintiffs. There is no way of knowing whether these employes are actually

giving the grades provided for in the Federal Act because by the time the grain reaches the terminals where there are federal inspectors the farmer no longer owns the grain and has no lawful interest in it. These plaintiffs, interested parties, desire to perpetuate such a condition. Is it unreasonable for the state, although recognizing the supremacy of the Federal Act, although approving in detail every right of a federal inspector, we repeat, is it unreasonable where there are no federal inspectors and where, under an intelligent construction of the Federal Act there never can be any federal inspectors, for the state to step in under the police power and bring some necessarily slight pressure to bear in order that the rights conferred by the United States Grain Standards Act may be actually received throughout the state of North Dakota? If Florida may say that no fruit can be shipped outside the state where in the opinion of the state it is unfit for human food—if the state of Louisiana may provide that no coke may be sold in the state of Louisiana until it passes under state inspection and supervision—if Ohio may provide that no securi ties may be sold, even though in interstate commerce, unless the person selling has a state license permitting him to sell—if under these illustrations and the multitude of other illustrations of similar purport where State Acts have been sustained such laws shall have been found by this court to be properly within the police power and not properly regulations of interstate commerce, why should the action of the state of North Dakota in simply en-

deavoring to make certain that only properly qualified persons may grade grain, be made the subject of an adverse holding from this court? We submit that there is no proper legal reason why the decision of this court in the Cargill case cited above is not in all respects applicable to the decision of this case. The provisions of the Minnesota Law in the Cargill case were much more burdensome and detailed than are the provisions of the present law. We invite the attention of the court to the recitals of that law as contained in the opinion of the court in the Cargill case. Can it be properly said that such a law was not in every respect more actually burdensome upon interstate commerce than the law now before the court?

9.

The points raised by appellees as to claimed conflicts between the North Dakota Act and the United States Grain Standards Act are discussed in our original brief. We believe that the construction which we there suggest offers a method of avoiding any conflict between the two acts, the rule being that any reasonable construction should be adopted which would avoid a claimed conflict.

10.

In conclusion, therefore, we think that a fair analysis of the law will demonstrate that it is essentially and legally different from the act held unconstitutional in the Lemke case.

We think that it is in no way in conflict with the United States Grain Standards Act but is by the terms of such Federal Act, the interpretation placed thereon by the secretary of agriculture and the characterization of such act by decisions of this court, wholly co-operative with the Federal Act.

We think that the construction of Section 17 of the North Dakota Act sought for by the appellees is neither proper nor reasonable and that a proper construction of such section shows that there was no intention of attempting to clothe the supervisor with powers previously held unconstitutional in the Lemke case and that in any event the provisions of Section 17 are in nowise vital to the present act and should be so construed.

Respectfully submitted,

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APR 30 1923
WM. R. STANSBUR

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. ~~[illegible]~~ 34

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

Appellees' Brief.

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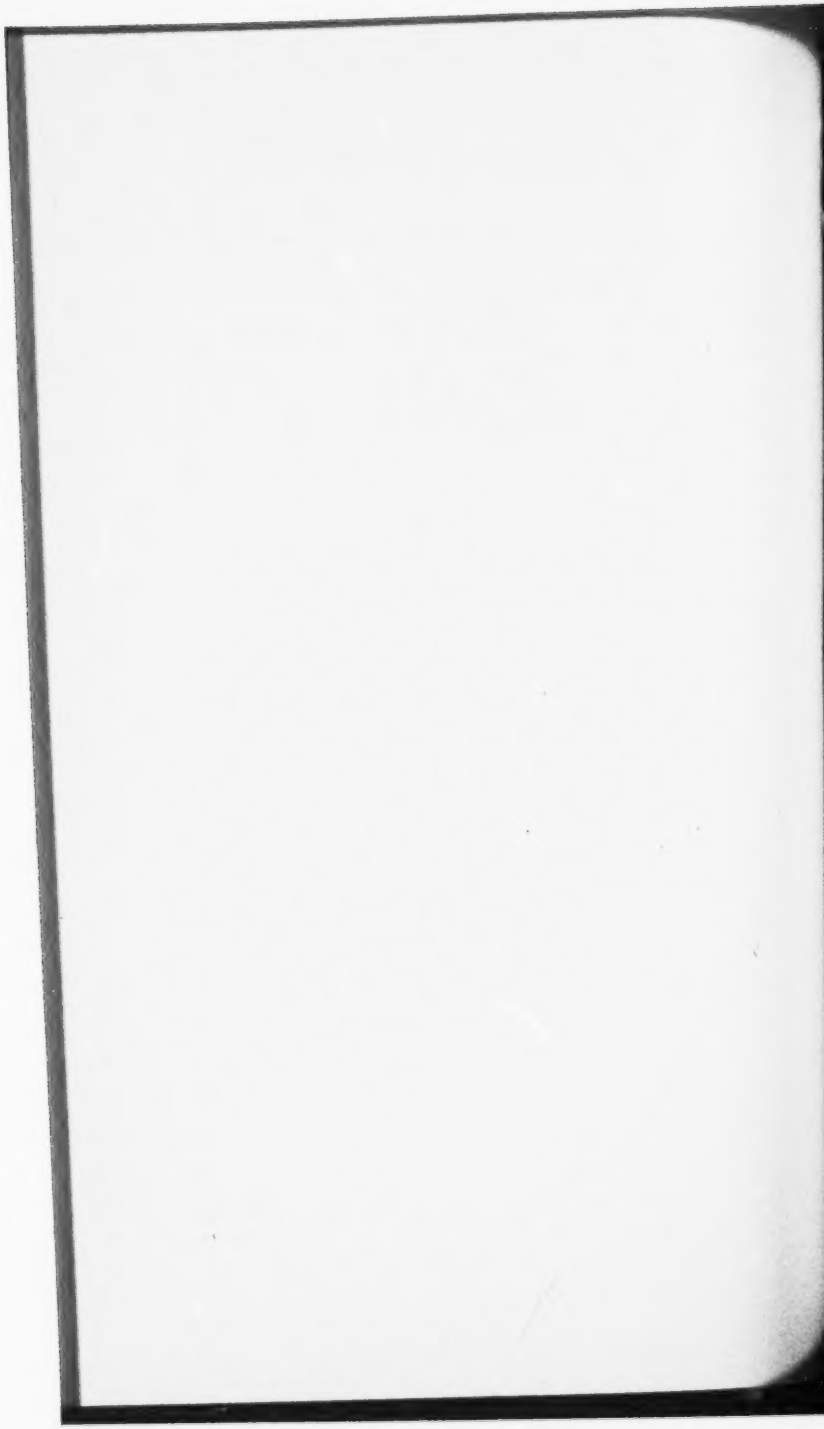

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 958.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, BERWICK FARMERS GRAIN COMPANY, GRANDIN FARMERS GRAIN COMPANY, HAMPDEN FARMERS ELEVATOR COMPANY, WALHALLA CO-OPERATIVE ELEVATOR COMPANY, GLENFIELD CO-OPERATIVE ASSOCIATION, FARMERS CO-OPERATIVE ELEVATOR COMPANY OF CANDO, BENEDICT FARMERS CO-OPERATIVE ELEVATOR COMPANY, FARMERS ELEVATOR & MERCANTILE COMPANY OF ROGERS, CAYUGA FARMERS ELEVATOR COMPANY, LYBECK GRAIN COMPANY, I. L. BERGE ELEVATOR COMPANY, REGAN & LYNESS ELEVATOR COMPANY, KENSAL FARMERS ELEVATOR COMPANY, CHAMLEY BROS. GRAIN COMPANY, GWINNER FARMERS GRAIN COMPANY, FREEBORN ELEVATOR COMPANY, HAZEN GRAIN COMPANY, ELDRIDGE FARMERS ELEVATOR COMPANY, CARRINGTON GRAIN COMPANY, PINGREE GRAIN COMPANY, FARMERS GRAIN COMPANY, CARGILL ELEVATOR COMPANY, OCCIDENT ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF NORTH DAKOTA, W. M. NODDINGS, DOING BUSINESS AS THE NODDINGS GRAIN COMPANY, L. L. KRUCHTEN, DOING BUSINESS AS THE PERTH ELEVATOR, J. C. SMITH, DOING BUSINESS AS ALEXANDER GRAIN COMPANY, F. M. COOK, DOING BUSINESS AS THE WOODWORTH GRAIN COMPANY, JOHN A. AIRD, ALEXANDER HARCHANKO, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, ROBERT FLEMING, JAMES WHELAN, PIERCE BLEWETT, DOING BUSINESS AS THE STAR ELEVATOR COMPANY, HANS NEILSON, DOING BUSINESS AS THE ELK VALLEY FARMS COMPANY, E. H. RAY, ARNOLD BROS., C. H. SHELDON, LOUIS GJERE, DOING BUSINESS AS THE CANDO GRAIN COMPANY, SCHILLING & KRUGER, O. B. SORENSON, V. W. STEELE, DOING BUSINESS AS JUD ELEVATOR COMPANY, JOHN SOUTHALL, J. A. FRANK, H. C. SORENSON, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, JOHN BIBELHEIMER,

DOING BUSINESS AS THE WASHBURN GRAIN COMPANY, N. O. PARSONS, DOING BUSINESS AS THE INDEPENDENT GRAIN COMPANY, A. C. ANDREWS, DOING BUSINESS AS THE ANDREWS GRAIN COMPANY, ALL IN THE STATE OF NORTH DAKOTA, AND ACME GRAIN COMPANY, ATLANTIC ELEVATOR COMPANY, GEORGE C. BAGLEY ELEVATOR COMPANY, COLUMBIA ELEVATOR COMPANY, DODGE ELEVATOR COMPANY, EMPIRE ELEVATOR COMPANY, GREAT WESTERN GRAIN COMPANY, IMPERIAL ELEVATOR COMPANY, MILLER ELEVATOR COMPANY, MINNEKOTA ELEVATOR COMPANY, MONARCH ELEVATOR COMPANY, NATIONAL ELEVATOR COMPANY, NORTHLAND ELEVATOR COMPANY, OSBORNE-McMILLAN ELEVATOR COMPANY, POWERS ELEVATOR COMPANY, RUGBY ELEVATOR COMPANY, ST. ANTHONY & DAKOTA ELEVATOR COMPANY, VICTORIA ELEVATOR COMPANY, WINTER-TRUESDELL-AMES COMPANY, WOODWORTH ELEVATOR COMPANY, AND INTERNATIONAL ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF MINNESOTA, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

Appellees' Brief.

STATEMENT OF CASE.

This case involves the validity of a Statute of North Dakota which was passed as an initiated measure at a general election held in the State of North Dakota on November 7th, 1922. This Statute is known as the North Dakota Grain Grading Act and, as appears from its preamble, it declares the purpose of the State of North Dakota to supervise and regulate the marketing of farm products and is designed to prevent unjust discrimination, fraud and extortion in the marketing of same, establish a system of grading, weighing and measuring farm products, define the scope and manner of such supervision and the powers and duties of the persons charged with same, and provide for licensing buyers, solicitors and

warehouses handling such farm products. It was initiated and passed to replace Chapter 138 of the Laws of North Dakota for 1919, which was declared unconstitutional by this Court in the case of *Lemke v. Farmers Grain Company of Embden, N. D.*, decided on February 27th, 1922, and reported in volume 66 of the Lawyers' Edition of the Supreme Court Reports at page 273, and in *Lemke v. Homer Farmers Elevator Company, et al.*, decided the same date and reported in 62 L. Ed. 280.

The Court below, consisting of Circuit Judge Wm. S. Kenyon and District Judges J. W. Woodrough and J. S. Elliott, sitting as the District Court of the United States for the District of North Dakota, Southeastern Division, pursuant to Section 268 of the Judicial Code, granted a temporary injunction against the enforcement of this initiated law. The appeal questions the correctness of this ruling.

The case is presented to this Court on a record which discloses a situation identical with that disclosed by the record in the case of *Lemke v. Homer Farmers Elevator Company*, 66 L. Ed. 280, which was No. 604 on the October, 1921, Term of this Court. In that case, this Court found that "the facts are not materially different from those presented in the former case (*Lemke v. Farmers Elevator Company of Embden*, 66 L. Ed. 273, No. 456, October, 1921, Term), and the reasons therein stated for the conclusion reached are controlling here." This applies with equal force to the present case with the single exception of a change in the phraseology of the statute involved. For this reason, and because the time available for the preparation of this brief is so short, we do not deem it necessary to rehearse again at length the facts regarding the manner in which the grain trade is carried on and conducted in the Northwest. The facts are admirably summed up in the opinion of this Court in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, and in the opinion of the Circuit Court of Appeals for the 8th Circuit, in the same case, which in that Court

was entitled *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635. All the facts commented on in either of these opinions are clearly disclosed in the present record.

The appellees represent and include all types of elevator companies,—Farmers co-operative elevator companies, which operate single elevators on a co-operative plan, independent elevator companies operating single elevators, and line elevator companies operating as many as ninety-five elevators in North Dakota. Each of these appellees is engaged in the purchase of grain from the farmers in North Dakota for shipment to the large terminal markets, principally in Minnesota, and this transaction has been definitely determined by this Court to be an integral part of interstate commerce by the decision in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273.

The appellants, who were substituted for the original defendants below, are the officials of the State of North Dakota, who by the most recent Grain Grading Act, the constitutionality of which is here involved, are charged with the duty of enforcing State supervision and regulation over the marketing of grain.

In the cases involving the validity of the 1919 Grain Grading Act of North Dakota, there were three questions of law involved which were stated by the Circuit Court of Appeals for the 8th Circuit, in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635, at page 643, as follows:

> "(1) Is the purchase of grain in the State of North Dakota for shipment out of the State as detailed in the evidence a part of the interstate commerce involved in the shipment?
>
> (2) If the foregoing question should be answered in the affirmative, does Chapter 138, Session Laws North Dakota, 1919, impose a direct and unreasonable burden upon that interstate commerce?
>
> (3) Is said law in conflict with United States Grain Standards Act to such an extent as to render it void?"

To each of these questions, that Court gave an affirmative

answer. By the decision of this Court in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, the first of these three questions is eliminated from the present discussion. The second question is at least partially eliminated. This Court having held that the 1919 Act did impose a direct and unreasonable burden upon interstate commerce, the second question resolves itself simply into whether or not there is any substantial difference in respect to the effect on interstate commerce between the 1919 Act and the latest Grain Grading Act.

The question of whether or not the North Dakota Act conflicts with the United States Grain Standards Act, this Court expressly refused to decide in the former cases.

In addition to the questions already mentioned, the elevator companies, in the cases in which the 1919 Grain Grading Act was held invalid, urged at all times that, in addition to the many other reasons for its invalidity, its enforcement would deprive the elevator companies of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. A decision of this question was rendered unnecessary by the holding of this Court in support of the other contentions of the elevator companies. We again submit this as an additional factor in the present case.

In support of the temporary injunction granted by the Court below, we therefore invite this Court's attention to the following propositions upon which we rely in contending that the latest North Dakota Grain Grading Act is invalid.

I.

The North Dakota Statute is a violation of the commerce clause of the Federal Constitution.

1. The sale of grain by the farmer in North Dakota to the elevator company for shipment to the terminal markets is an inherent part of interstate commerce in grain. This can no longer be questioned.

2. There is no substantial distinction between the latest Grain Grading Act and the 1919 Act, insofar as the effect on interstate commerce in grain is concerned, and the Act here involved imposes a direct and unreasonable burden upon that commerce just as the former Act did.

II.

The new Act conflicts with the United States Grain Standards Act authorizing the establishing of federal grades and Service and Regulatory Announcements, Nos. 33 and 46, establishing thereunder official Grain Standards of the United States for wheat, shelled corn and oats.

III.

The new Act is in conflict with the Fourteenth Amendment to the Federal Constitution in that it interferes with the right of individuals, and especially the owners of elevators and mills, to make contracts.

All of the above points are argued in the following brief, but we feel confident that, although a first reading of the latest North Dakota Grain Grading Act might suggest that some of the objectionable provisions of the former law have been omitted, a careful examination of the new Act will clearly indicate that such is not the case, but that, on the other hand, the purpose, effect and result sought by the new Act are identical with the purpose, effect and result of the former law and that the means of accomplishing the desired purpose, namely, State control of the marketing of grain in interstate commerce, are, in fact and in legal effect, the same under both laws. There is, to be sure, considerable difference in phraseology and wording, which may be accounted for by the necessity of shortening the Act and making it more general for convenient submission to the electorate, but there is apparently no attempt, in framing this latest North Dakota Grain Grading

Act, to recognize or submit to the decisions of the Federal Courts rendered in cases directly involving the former law, limiting the power of the State of North Dakota in respect to the marketing of grain in interstate commerce and announcing the exclusive power of Congress to regulate such interstate commerce. The new Act is a mere re-assertion of a power which the State still claims in spite of the express denial of its existence by this Court in the former cases.

STATEMENT OF FACTS.

DEFINITION.—In the record, the terms "primary market" and "terminal market" are used in referring to the markets where grain is received by rail from many localities. In this brief, we refer to these markets as "terminal markets" and the elevators there located as "terminal elevators." The market to which the farmer hauls his grain is referred to in the record indiscriminately as the "local market," "farmers' market" and "country market." In this brief, we refer to this market as the "country market" and the elevators there located as "country elevators."

COMMERCE IN NORTH DAKOTA GRAIN IS LARGELY INTERSTATE. —North Dakota produces more spring wheat than any other state in the Union. Its crop varies from one hundred million bushels to one hundred fifty-six million bushels annually. This great quantity of wheat when marketed moves largely to other states. Approximately ninety per cent of the wheat raised and sold in North Dakota is bought for shipment to and is actually shipped to the terminal markets outside of the State, principally to the Minnesota terminals at Minneapolis and Duluth. Only ten per cent is sold for use within the State of North Dakota. It thus appears that consumers throughout the United States are largely dependent upon the wheat grown in North Dakota for their supply of flour and other wheat products, and conversely the producers of wheat in North Dakota are largely

dependent upon the demand in other states for a market for their grain.

This general situation has existed for many years and facilities have been developed in recognition of its existence and its permanency. Country elevators have been built connected with railroad tracks at all stations within the grain growing area throughout North Dakota by men and companies engaged in handling this grain. Approximately twenty-two hundred such elevators are operated within the State of North Dakota. These elevators are of limited capacity and are used largely to facilitate the transferring of grain from the farmers' wagons, in which it is hauled to the local market, to railroad cars for shipment to the terminal markets beyond the State as rapidly as carload lots of one grade of grain are accumulated and cars for loading can be obtained. At the terminal markets terminal elevators of great capacity have necessarily been gradually built up to receive and hold this grain until it is milled or exported. The aggregate elevator capacity in Minneapolis is fifty-six million one hundred fifty thousand bushels, and at Duluth, thirty-six million three hundred twenty-five thousand bushels, making a total elevator capacity at the Minnesota terminals of ninety-two million four hundred seventy-five thousand bushels. Thus not only does this vast interstate commerce exist, but, in order to provide facilities for it, enormous permanent investments have been made and thousands of persons are actively engaged in carrying it on.

The price paid for wheat in North Dakota is based on the Minnesota terminal market price. This fact is known to sellers and cards showing such price basis are generally posted in North Dakota country elevators. The "Margin" referred to in the North Dakota Statute is the difference between the Minnesota terminal market price and the price paid at the country elevator in North Dakota less freight to the terminal market.

STANDARDS FOR GRADING GRAIN IN NORTH DAKOTA PRIOR TO THE ESTABLISHMENT OF THE FEDERAL AND NORTH DAKOTA

STANDARDS.—Long prior to 1916 Minnesota had provided for the establishing of standard grades for grain known as "Minnesota Grades." The State Board of Grain Appeals annually, at the beginning of the crop movement season, established and published such grades to apply during the ensuing season. A Grain Inspection Department was created with a force of Inspectors charged with the duty of grading grain. It had as well a State Grain Weighing Department. In the exercise of its police power over public elevators it required that all grain received in such elevators for storage be inspected and graded by a State Inspector and reinspected when it was delivered out of the elevators. Section 4442, General Laws of Minnesota 1913, provides:

> "Inspection. All grain received at a terminal warehouse shall be inspected and graded by a State Inspector, and reinspected in like manner upon delivery from such warehouse. The charges for such inspections shall be paid by the warehouseman and added to the storage, and the Chief Inspector may recover such charges from the warehouseman."

This Minnesota Statute is similar to the Missouri Statute involved in *Merchants' Exchange v. Missouri*, 248 U. S. 365. Like Statutes exist in practically all the grain producing states and no longer is there any doubt as to their validity. The storage and handling of grain for others is a business affected with a public use and its regulation is within the police power of a state. Such Statutes are designed to protect the public from fraud and imposition.

Because the bulk of the North Dakota wheat moved to Minnesota and was sold at the Minneapolis and Duluth terminal markets according to Minnesota grades, naturally buyers of grain for the Minnesota terminals bought it in North Dakota according to these grades. This was the general practice although some buyers used "card grades" containing certain grades of wheat which were not official "Minnesota Grades." Of course, grain so bought was not actually inspected in North

Dakota by a Minnesota Inspector, but the buyer and seller would agree that a quantity of wheat brought to a North Dakota elevator for sale was No. 1 or No. 2, or some other defined Minnesota grade, and would then agree to buy and sell at the price which was the going price for that grade of wheat.

But the Minnesota Statute had no application to the business of buying grain and did not require that all grain bought and sold in the State should be first graded or that grain must be bought or sold according to "Minnesota Grades." The State established and defined the grades and it furnished the facilities for making a State inspection at a prescribed fee. Naturally in order to make trading in grain exact and definite at the Minnesota terminals, grain buyers as well as elevator owners bought and sold grain as of a certain Minnesota grade, according to State inspection. Under such sales, if, on appeal, the grade was changed, a corresponding price adjustment could be made. In contracts for future delivery of grain, the Minnesota grade was adopted as affording an accurate and dependable description of the kind of grain to be delivered under the contract and the Minnesota inspection was adopted as final evidence of the grade. These grades and this inspection were not only recognized at Minnesota terminals, but generally in other terminal markets as well as in the country markets. This general acceptance of Minnesota grades, however, was not under attempted compulsion of the Minnesota Statute. The only Statute attempting to compel acceptance of local State grades to which our attention has been directed, other than the North Dakota Statutes, is a Wisconsin Statute, Chapter 19, Laws of Wisconsin 1905, as amended Chapter 12, p. 19, Sp. Sess. Laws 1905. This law was held invalid as an interference with interstate commerce in *Globe Elevator Co. v. Andrew,* 144 Fed. 871, affirmed 156 Fed. 664. The applicability of this decision to the North Dakota Statute, as well as the inapplicability of the decision on the Missouri Warehouse Statute will be discussed later.

In 1916 Congress enacted the United States Grain Standards Act, being Part B of the Agriculture Appropriation Act of August 11, 1916, Chapter 313. This Act authorized the Secretary of Agriculture to establish grain standards or grades. Pursuant to this authority, Service and Regulatory Announcement Number 33, promulgated April 13th, 1918, effective July 15th, 1918, established official grain standards for wheat and shelled corn and Announcement Number 46, promulgated March 15th, 1919, effective June 16th, 1919, established official grain standards for oats.

After the passage of the Federal Act, the Legislature of North Dakota in its 1917 Session passed a Grain Grading and Inspection Statute. This Act, one provision being eliminated, was sustained as valid by the Supreme Court of North Dakota (*State, ex rel. Gaulke v. Turner*, 164 N. W. 924). We are not concerned with the correctness of that decision because in 1919 the State Legislature passed another and essentially different Marketing, Inspection and Grading Statute and expressly repealed the 1917 Act. This latter Statute, Chapter 138 of the 1919 Laws, is the Act which was declared invalid in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, and *Lemke v. Homer Farmers Elevator Company*, 66 L. Ed. 280.

After the invalidity of the 1919 Act had been definitely and conclusively determined, the present Act was initiated and submitted to the electorate of North Dakota on November 7th, 1922, and was adopted, and this is the Act which is brought in question by the present case.

For convenience in comparing the terms of the two Acts, we have printed below the full text of the 1922 Act and the important portions of the 1919 Act in such manner as to indicate readily a comparison of the specific provisions of each Act bearing on any particular point, and have printed in bold type those portions of the two Acts which have a direct bearing on the questions here involved.

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922.

An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; **providing for licensing buyers, solicitors,** and warehouses handling such farm products; and making an appropriation therefor.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

Section I. **For the purpose of encouraging, promoting and safeguarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in the marketing of all kinds of grain, seed and other agricultural products,** we, the people of the state of North Dakota do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The Board of Railroad Commissioners of the state, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weighing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3,600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filled in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The State Supervisor of Grades, Weights and Measures shall maintain his office and principal place of business at the Agricultural College of this

THE NORTH DAKOTA GRAIN GRADING ACT OF 1919.

(Extracts.)

Sec. 1. The Governor of the State of North Dakota, on or before the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the State Inspector of Grades, Weights and Measures, who shall receive, with the approval of the State Board of Regents, the sum of One Thousand Dollars per annum.

state, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College (and especially of the State Experiment Mill at said College), to assist and co-operate with the State Supervisor of Grades, Weights and Me. sures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the State Supervisor of Grades, Weights and Measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the Secretary of Agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this state. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punish for contempt.

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

Sec. 3. It shall be the duty of the Inspector of Grades, Weights and Measures to proceed at once to define and establish uniform grades and weights for grain, seeds or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Section V. That whenever grades, weights and measures shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the State Supervisor of Grades, Weights and Measures, or by the Secretary of Agriculture of the United States, then **no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act;** provided, that any person may buy any such products by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. **The State Supervisor of Grades, Weights and Measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products,** provided that such buyer, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the State Supervisor of Grades, Weights and Measures. **The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded according to the provisions of this act and the rules and regulations made hereunder.**

Sec. 14. **It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a Deputy Inspector of Grades, Weights and Measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products without first procuring a Deputy Inspector of Grades, Weights and Measures' license,** provided, however, that this section shall not prohibit State Deputy Inspectors from inspecting, weighing and grading grain, seeds and other agricultural products under the direction and supervision of the State Inspector of Grades, Weights and Measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. **... erson may without a license ... ny grain, seeds or other agr... ural products that have been graded, inspected and weighed by a Deputy Inspector of Grades, Weights and Measures, or State Deputy Inspector of Grades, Weights and Measures.**

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

Sec. 11. **The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products or the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill,** provided, that such buyer or agent shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. **The condition of such license shall require such Deputy Inspectors of Grades, Weights and Measures to fix grades and dockage of grain and seeds inspected at their respective**

Section VII. **The State Supervisor of Grades, Weights and Measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage without compensation, or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act.** Upon such suspension or revocation, if the licensee is not satisfied with the decision of the State Supervisor of Grades, Weights and Measures, he may appeal to the District Court of his county and have such order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the Secretary of Agriculture buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. **A state warehouse license must be obtained through the State Supervisor of Grades, Weights and Measures for each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the State Supervisor of Grades, Weights and Measures, and shall not exceed $1.00 for each 1,000 bushels capacity of such warehouse.** The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in soliciting or procuring consignments of grain, seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. **The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the State Inspector of Grades, Weights and Measures. The State Inspector of Grades, Weights and Measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder.** All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the State Inspector of Grades, Weights and Measures.

Sec. 12. The State Inspector of Grades, Weights and Measures shall collect a fee of $10.00 for each license issued under the provisions of Section Eleven of this Act.

Sec. 26. **A state warehouse license must be obtained through the State Inspector of Grades, Weights and Measures for each and every public grain warehouse in operation in this state.** No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. **The license fee is hereby fixed at Eight Dollars for warehouses of a capacity of 12,000 bushels or less and Ten Dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and**

Section IX. It shall be the duty of the Supervisor of Grades, Weights and Measures to inspect public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the state, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this state in relation thereto.

Twelve Dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and Twenty Dollars for all warehouses over 50,000 bushels and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the State Inspector of Grades, Weights and Measures shall collect from the person applying therefor the license fee required herein.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this state in regard to the same, provided, that all such rules shall be published by the State Inspector of Grades, Weights and Measures in such manner as to give the greatest publicity thereof;

Sec. 22. **The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, and who does not pay cash in advance for the grain so bought shall file with the State Inspector of Grades, Weights and Measures a bond, to the state with good and sufficient sureties, to be approved by the Inspector of Grades, Weights and Measures in the penal sum of not less than Five Thousand Dollars nor more than Seventy-five Thousand Dollars, in the discretion of the State Inspector of Grades, Weights and Measures conditioned for the faithful performance of their duties as Public Warehousemen and the compliance with all the laws of this state in relation thereto.** Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation and shall be in an amount sufficient to protect the

Section X. **And it shall be the duty of every public warehouseman in this state to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the Supervisor of Grades, Weights and Measures upon written request.**

Section XI. **In case of any dispute as to grades, weights or measures between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product, and shall be sent to the Supervisor of Grades, Weights and Measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.**

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the Supervisor of Grades, Weights and Measures or who does not hold a license to grade, weigh or measure grain seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons, corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the Supervisor of Grades, Weights and Measures, provided, however that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. **To accomplish the purpose of this act the State Supervisor of Grades, Weights and Measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary,** holders of the outstanding grain tickets.

Sec. 20. **It shall be the duty of all Deputy Inspectors of Grades, Weights and Measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades received at terminal markets or within the state. This information shall be furnished the State Inspector of Grades, Weights and Measures upon written demand thereof.**

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(e) **To hear and determine appeals from the decision of State Deputy Inspectors and from Deputy Inspectors of Grades, Weights and Measures;**

Sec. 19. The State Inspector of Grades, Weights and Measures shall receive, hear and determine all appeals from the decision of all State Deputy Inspectors and from all Deputy Inspectors. All such appeals shall be heard and determined by the State Inspector of Grades, Weights and Measures under such rules and regulations as he may establish therefor and he shall consider the flour and bread producing qualities of such grain where such final decision is necessary. It shall be the duty of Deputy Inspectors of Grades, Weights and Measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this

and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the Department of Grain Grading, shall remain within the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the Supervisor of Grades, Weights and Measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, **and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act.** And it shall be the duty of the Attorney General of the state and his assistants and all of the state's attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the State Supervisor of Grades, Weights and Measures.

Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

Section XIV. **The salary of the Supervisor of Grades, Weights and Measures shall be paid out of the grain grading fund,** and he shall give bond to the state in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota Grain Grading Department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Sec. 30. Any person who forcibly assaults, resists, impedes or interferes with the State Inspector of Grades, Weights and Measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen days or more than thirty days, or both such fine and imprisonment.

Section XVI. **There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the State Treasury the sum of ten thousand dollars, together with all moneys in the State Treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act shall be turned**

Sec. 31. All money in the State Treasury known as the State Grading and Weighing Fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State Inspector of Grades, Weights and Measures. All fees and licenses collected by the State Inspector of Grades, Weights and Measures

into the State Treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. **All of the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures;** and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

shall be turned into the State Public Grain Grading and Weighing Fund, and the salaries and compensation of the State Inspector of Grades, Weights and Measures, Chief Deputy Inspector of Grades, Weights and Measures, Chief Elevator Accountant and all other Deputies, Inspectors, Accountants, Experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

Immediately after the passage of the 1922 Act, the present proceeding was instituted, but not before one John N. Hagan was appointed by the Board of Railroad Commissioners of the State of North Dakota as State Supervisor of grades, weights and measures, pursuant to the provisions of the 1922 Act, according to the allegations of the defendants' answer. The injunction granted therefore ran against said John N. Hagan as well as the defendants named in the case.

It is not necessary to go outside of the Act itself to discover the purpose, force and effect of it. The preamble expressly states that *it is the purpose of the State of North Dakota to supervise and regulate the marketing of farm products,*—this in the face of the decision of this Court to the effect that under the circumstances existing in the grain trade in North Dakota, the marketing of the crop is an inherent part of interstate commerce in grain; the object of the Act is *to prevent unjust discrimination, fraud and extortion in the marketing of farm products and to establish* a system of grading, weighing and measuring farm products and *to prohibit the purchase of such products by grade, excepting subject to State control and supervision,*—and this in the face of the Federal Grain Standards Act, providing for Federal control and regulation of such purchases; and the further purpose of the Act is *to provide for li-*

censing buyers, solicitors and warehouses handling farm products,—and this in the face of the repeated declarations by this Court and other Federal Courts, that buyers of grain in North Dakota are engaged in interstate commerce. In addition to the preamble, the entire Act is replete with indications of a *purpose on the part of the State of North Dakota to accomplish identically the same result in respect to the control, regulation and supervision of the purchase of grain in interstate commerce, as the 1919 Act was designed to accomplish.* The most glaring and daring example of this is in the last section of the Act, whereby the Supervisor of grades, weights and measures is invested with "all the duties and obligations which were formerly performed by the State Inspector of grades, weights and measures and all of the obligations placed upon him by law," although the office of State Inspector of grades, weights and measures was the office created by the 1919 Act, and subject to the duty and obligation of enforcing that Act.

MARGINS.—The price paid for grain at the country market in North Dakota is based on the market price at the terminal markets in Minneapolis and Duluth, Minnesota. The difference between the market price at the terminal market and the price paid at the country market less freight is known as the margin. It follows that the regulation or supervision of margins which the elevator is permitted to pay fixes the price of the grain purchased and the profit accruing to the purchaser. If the margin is too small to cover necessary expenses, the transaction necessarily results in a loss. The term margin of profit has a recognized and established meaning in the grain trade, and the attempt in the 1919 Act to confer on the State officials the power to regulate margins of profit was one of the serious defects in that Act. In the new Act, the attempt has been made to accomplish this identical result, although the precise terminology of the former Statute has been studiously avoided. The authority now conferred on the State officials is fully as broad in this respect as the authority conferred by

the 1919 Act. The new Act makes it the duty of the State Supervisor of grades, weights and measures to "*investigate and supervise the marketing of same (grain, seed and other farm products) with a view of preventing * * * unreasonable margins of profit*" and in addition confers upon the Supervisor of grades, weights and measures all the duties and obligations which were formerly performed by the State Inspector of grades, weights and measures, one of which was "to establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills." The new law therefore, in terms, authorizes the State officials to fix the price at which grain shall be bought, if bought at all, in the State of North Dakota and such a Statute is a clear violation of the commerce clause of the Federal Constitution as applied in *Lemke v. Farmers Grain Company of Embden, supra.*

DOCKAGE.—The new law, like its predecessor, requires that, regardless of the agreement between the buyer and the seller, and regardless of the price paid for the grain, the buyer must either separate the dockage from the grain by screening it and return the dockage to the seller, or make to the seller a specific payment for the dockage. The provisions of the new law are even more exacting on this point than were the provisions of the former Act. The 1919 Statute provided that "dockage shall be considered as being of two classes, first, that having value and second, that having no value, the former to be considered and paid for at its market value" whereas the new Act provides that "in establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer."

It is a recognized fact that in the absence of any statutory provision regarding dockage, grain containing dockage commands a higher price on that account. This is true at the country markets, and also at the Minnesota terminals.

It cannot be assumed that the State officials of North Dakota will place upon the provisions of the new Act, any interpretation other than that which was placed upon the provisions of the 1919 Statute and under that Statute all buyers of grain in North Dakota were compelled to make to the farmer a specific payment for his dockage, or to return to the farmer a like amount of dockage. Furthermore, as interpreted by the State officials, the price to be paid for dockage could be dictated by the seller. Such interference with the purchase of grain in interstate commerce is a direct regulation of that commerce, and in this respect there is no possible distinction between the present law and the former Statute which has already been declared unconstitutional by this Court.

LICENSE.—The new Act is an ingenious and studied attempt to compel grain buyers to pay for the expense of enforcing the Act without in terms requiring a license fee from them. Under the 1919 Act, the express imposition of a license fee on grain buyers was one of the objectionable features of the law. Under the new Act, the same result is accomplished by increasing the warehouse license fee sufficiently to provide fees for the enforcement of the Act. The practical effect of this is to collect from grain buyers this excess warehouse fee.

From a comparison of the warehouse fees provided for by the 1922 Act with the fees under previous Statutes which have proven ample to support legitimate warehouse Statutes, it is obvious that there is a large excess which will be available under the new Act which is not needed and will not be used for the enforcement of the legitimate North Dakota warehouse Statutes, and the 1922 Act frankly admits that this excess will be applied to enforce the control, which by the terms of this Act, the State of North Dakota undertakes to exercise over the marketing of grain in interstate commerce.

Prior to the 1922 Act, the average warehouse fee was $6.00 per year for each warehouse and the fees available from this source were ample to take care of the administration of the

rules and regulations governing the operation of warehouses. The average capacity of country elevators in North Dakota is approximately thirty thousand bushels. Under the 1922 Act, a fee of $1.00 per one thousand bushels of capacity is authorized, or in other words, an average of $30.00 per year per warehouse. The difference, namely $24.00 per year per warehouse, is in effect and in fact to be paid under the 1922 Act as a fee for the buyer's license, although nominally imposed as a warehouse fee. The 1922 Act, in substance therefore, does not differ from the 1919 Act in this respect any more than in any other respect.

Conflict Between State and Federal Acts.

Although the North Dakota Act provides for the adoption of Federal standards and grades, the actual and important duties performed under the two Acts are performed by different officials and all the grain bought in North Dakota and shipped and marketed in Minnesota will necessarily be subjected to two distinct inspections, each made by different inspectors acting under different authorities and different rules and regulations and subject to different control.

It is clear that although in terms, the Act does not require that grain be graded by employees of the elevator companies, this is necessarily the fact and is assumed and admitted throughout appellants' brief. As the grain trade is conducted in North Dakota and throughout the Northwest for that matter, the managers of the country elevators are the only persons available for the purpose of inspecting and grading grain. Under the 1922 North Dakota Act, grain purchased in North Dakota will necessarily be graded by employees of the elevator companies. Such persons are not competent to become Federal Inspectors under the Grain Standards Act.

The United States Grain Standards Act, Section 7, provides that the Secretary of Agriculture shall issue licenses to per-

sons duly authorized to inspect and grade grain under the laws of states having a grain inspection department. This provision was inserted for the obvious purpose of taking advantage of existing State Warehouse Acts, providing for impartial and disinterested State Inspectors, because it is further provided:

> "that no person licensed by the Secretary of Agriculture to inspect or grade grain or employed by him in carrying out any of the provisions of this Act shall, during the term of such license or employment, be interested financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

This proviso expressly prohibits the exact situation which would exist under the 1922 North Dakota Act.

The possibility of confusion arising from dissimilar standards which existed under the 1919 Act is avoided by the provision of the new law that where the Secretary of Agriculture has established grades under the United States Grain Standards Acts, these grades shall be adopted as the North Dakota grades, but the confusion and interference incident to a dual inspection is clearly not avoided because the dual inspection necessarily exists so long as the two Statutes are in force. Furthermore, under the 1919 Act, North Dakota did in fact adopt the Federal grades. The situation in this respect is therefore the same as it was under the 1919 Act.

The grading of grain is not an exact science and cannot be done with mathematical accuracy, but necessarily involves the exercise of judgment and opinion on the part of those making the inspection. Competent and experienced inspectors will frequently give to the same grain different grades because of the difference in the judgment and opinion of the individuals. This is clearly illustrated by Exhibit A attached to the defendants' answer in this case (Rec., p. 36), which shows that even in the absence of any Grain Grading Act in North Dakota, the grades which the elevator managers give to grain vary considerably

from the grades which are ultimately given to the same grain at the terminal markets. One obvious reason for this situation is that the buyer at the country elevator, because of the keen competition between elevators, is anxious to procure the grain and tends for this reason to give it a higher grade than it actually deserves. The result is that grain is invariably graded lower at the terminal markets than at the country elevators, even in the absence of any State Grain Grading Act.

THE STATE ACT TAKEN IN CONNECTION WITH SECTIONS 3107, 3113, OF THE NORTH DAKOTA 1913 COMPILED LAWS, REQUIRE A TRANSACTION EXPRESSLY PROHIBITED BY THE FEDERAL STATUTE.

Section 3107 defines a public warehouse as an elevator operated "for the purpose of buying, selling, storing, shipping or handling grain for profit." Section 3113 is as follows:

> "What Storage Receipts Shall Express. Each storage receipt issued in this state shall expressly provide that at the option of the holder of such receipt the kind, quality and quantity of grain for which such receipt was issued shall be, on his demand, delivered back to him, at any terminal point or at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storage and insurance charges; and in case of terminal delivery the payment, in addition to the above, of the regular freight charges on the gross amount called for by the tickets being surrendered—such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt, but no charges shall be made for cleaning grain unless such grain has been actually cleaned. Nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade; provided, that grain placed in a special bin be excepted from the provisions of this section."

These sections were not repealed by either the 1919 Act or the 1922 Act. Under the State law, therefore, a person can take grain to any country elevator and have it inspected and graded by the State Deputy Inspector. Necessarily the grade given the grain will be one of the United States standard grades. He may store this grain and the elevator operator is required to give him a receipt for the amount of grain so stored, designating the grade. This receipt must contain a provision that on the payment of the freight charges to any terminal, the holder is entitled to grain of the same grade at that terminal or a terminal warehouse receipt for such grain. These warehouse receipts may be transferred. By the sale and transfer of the grain covered by the receipt, any one can receive delivery at the Minneapolis terminal of that grain on payment of the storage charges and the freight. The Federal Statute, however, in terms provides that:

> "No person thereafter shall ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade unless the grain shall have been inspected and graded by an inspector licensed under this Act and the grade by which it is sold, offered for sale or consigned for sale be one of the grades fixed therefor in the official grain standards of the United States."

The situation resulting from the conflict between the North Dakota Act and the Federal Act, cannot be judged by an examination of the situation existing in states having admittedly valid Warehouse Statutes of the usual sort. In Minnesota, for instance, Grain Inspectors are impartial and disinterested persons who are not interested in the merchandising of grain and are not employees of any elevator company. When the United States Grain Standards Act was passed and grades for weighing grain and oats were established thereunder, Minnesota, like North Dakota, adopted as the Minnesota standards the United States standards, but in Minnesota, unlike the situation under the North Dakota Act, all State Inspectors author-

ized to grade grain, are qualified to, and do in fact, take licenses as Federal Inspectors. The two systems can therefore operate harmoniously, which cannot be done under the North Dakota Act.

No claim is made by the plaintiff that the United States Grain Standards Act does or could apply to a transaction in grain which was completely intra-state. The announcements by the Secretary of Agriculture of the United States, which are attached to the defendants' answer in this case, illustrate clearly that the Secretary of Agriculture has no inclination to attempt any control or regulation of intra-state transactions in grain. These announcements, however, were issued prior to the decision in *Lemke v. Farmers Grain Company, of Embden*, 66 L. Ed. 273, and are obviously based on a misconception of when interstate traffic in grain commences. They proceed on the assumption that the sale by the farmer to the elevator is not a part of interstate commerce, whereas it has now been definitely determined to be so. In all likelihood the Secretary of Agriculture will now issue and promulgate rules and regulations governing such sales or, if there is any question as to whether or not the United States Grain Standards Act in its present form applies to such sales, Congress will in all likelihood expressly extend it so as to include them.

POINTS AND AUTHORITIES.

I.

THE NORTH DAKOTA STATUTE OF 1922 IS IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The sale of grain by the farmer to the elevator is now definitely conceded to be an integral part of interstate commerce in grain. The 1919 Act has been held to violate the commerce clause of the Federal Constitution because it was "a compre-

hensive scheme to regulate the buying of grain." It was so characterized by this Court in the Lemke case. Nevertheless, the State of North Dakota has frankly and admittedly declared its purpose, "to supervise and regulate the marketing of farm products" by the preamble to the new Act. There can be no question that the purpose of the 1922 Act is identical with that of the 1919 Act, and that it will accomplish the same identical result is obvious when its provisions are compared with those of the 1919 Act in the light of the admitted facts regarding the manner in which interstate commerce in grain is carried on in the State of North Dakota. Since the decision in the Lemke case, the State of North Dakota cannot lawfully control or regulate the sale or marketing of grain in North Dakota, and yet, by the very terms of the preamble to the new Act, this is the sole purpose of the statute now in question.

It is futile to attempt, as the appellants do throughout their brief, to separate the act of grading grain from the transaction by which the grain is sold in interstate commerce. Every argument advanced by the appellants on this proposition was advanced in the Lemke case in an effort to separate the sale itself from interstate commerce.

Leaving out of consideration sales by sample or by type, which are comparatively insignificant in number, and confining our attention to the normal case of a purchase of grain by grade by an elevator from a farmer, and conceding, as the appellants now must, that this purchase is a transaction in interstate commerce, and recognizing what is universally true and what is assumed and admitted by the appellants throughout their brief,—that in substantially every case the grading of grain is merely a means of determining the price to be paid, an incident to and a part of the purchase, the conclusion is inevitable that to control and regulate the transaction by which grain is sold in interstate commerce through a control and regulation of the grading of grain is just as truly an attempt to control and regulate inter-

state commerce as though the sale were in terms and specifically regulated as was the case under the 1919 Act.

It is not helpful to imagine a situation where grain is actually graded as a separate and distinct transaction without relation to its sale, and by parties wholly disinterested. We are dealing with an actual state of facts, and this is not a true picture of the conditions in NorthDakota. The fact is that the grading of grain is the one vital and inseparable incident to its purchase and sale in interstate commerce. It is the means by which the price is fixed. To permit a State to regulate the grading of grain in connection with its purchase in interstate commerce, is just as surely to permit a direct regulation of that commerce as it is to permit the fixing of the price at which grain may be bought in interstate commerce.

If the State of North Dakota, by means of regulations and rules governing the grading of grain at the time of its purchase in interstate commerce, can regulate and control the marketing of grain in interstate commerce, then the commerce clause of the Federal Constitution is meaningless so far as its practical effect is concerned. If the State of North Dakota can exercise the control over interstate commerce which will necessarily result from an enforcement of the 1922 Act after the 1919 Act has been declared unconstitutional, then the protection of the commerce clause of the Federal Constitution becomes a mere matter of phraseology without any practical significance. The purpose of the commerce clause is to prevent the accomplishing of a result, namely, interference with interstate commerce by the various States. Before the adoption of the Constitution, each State regulated all trading in commodities that might be found within its borders. The result is a matter of history. Each State, either in an attempt to obtain an advantage for its own citizens, or for the purpose of retaliation, or for some other selfish reason, regulated and supervised, if it saw fit, both the sale of goods brought into the State and the purchase of

goods within the State for transportation elsewhere. There was no authority which had the power to regulate entire transactions in which more than one State was involved. It was the disastrous effect of this condition on all interstate commerce which was recognized in and responsible for the commerce clause of the Federal Constitution.

If North Dakota can regulate and control the marketing of its grain crop, which, as the appellants insist, is its chief product, Minnesota and Michigan may do the same as to their iron; Pennsylvania and West Virginia as to their coal; the Southern States as to their cotton. In short, each State could control and regulate the marketing of its surplus commodities and the free flow of interstate commerce could thereby be interfered with, and, in fact, wholly destroyed,—a state of affairs identical with that which existed prior to the adoption of the commerce clause and the disastrous effect of which led to its adoption. No precedent can be found for such control and regulation as North Dakota assumes to exercise over the marketing of its grain crop save by going back one hundred and thirty-five years.

Throughout the argument in the Court below, and throughout the appellants' brief here, we are constantly reminded of the contention of the State of North Dakota that control and regulation of the marketing of the grain crop is necessary to the protection of the farmer of North Dakota. The point, however, is not involved in this case. A question far more fundamental is presented, which affects, not merely the farmer of North Dakota, but the citizens of every State in the Union, and the very authority and stability of the Federal Constitution. We do not concede that the claimed evils exist or that the grain grading act is adapted to or intended to remedy such evils if they did exist. We are convinced that the Act is political propaganda and holds out the lure of numerous official positions with salaries paid out of exactions from interstate com-

merce in grain. But, even if the alleged evils did exist, the answer to the contention that they call for control and regulation by the State of North Dakota cannot be better answered than in the words of this Court in the Lemke case.

> "It is alleged that such regulation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if regulation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce, placed by the Constitution under Federal control."

If anything other than the language of the Act itself is necessary to show that the one purpose which the Act is intended to accomplish is control by the State of North Dakota of the sale of grain by the farmer to the elevator, we have but to refer to the appellants' brief, which is replete with statements to this effect, and yet this is the very result which was so emphatically condemned by this Court in the Lemke case.

In addition to the fact that the 1919 Act and the 1922 Act are identical in the purpose which they are designed to accomplish and in the practical effect which they will have in practice, the specific provisions of these two statutes are substantially the same. The present law, like the former statute, creates a state officer with supreme authority to supervise and regulate the marketing of grain in North Dakota and delegates to such officer like powers of preventing "unjust discrimination, unreasonable margins of profits, confiscation of valuable dockage" and confers on the state officer the same power to arbitrarily interfere with and control the purchase of grain, to regulate margins of profit, to enforce the alternative of either making a specific payment for dockage of its market value (which market value must ultimately be determined by the state officer and not by the buyer and seller), or to screen the grain and return the

dockage to the producer. The new statute, like the old, in effect requires all buyers of grain to become licensed by the State and requires compliance by them with all rules and regulations of the State as a condition to their obtaining or retaining a license. The new law puts even greater burdens on interstate commerce in grain in the form of license fees and bonds than the old, and in conclusion, to make it certain that no power on the part of the state authorities to regulate, interfere with and burden interstate commerce that existed under the old law is omitted in the detailed provisions of the new, the 1922 Act concludes with the provision (Section XVII).

> "All the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed."

The office of the State Inspector of Grades, Weights and Measures referred to in the section above quoted was created by Chapter 138 of the Laws of 1919, and the duties or obligations of the State Inspector were defined by that law, which was declared unconstitutional in the Lemke case. The attempted exercise of State power which rendered the old law invalid was the exercise of the power conferred on this same State Inspector. It, therefore, appears that the new Act adopts *in toto* the regulatory provisions of the old Act and re-enacts the very law which this Court has declared invalid.

Not only is it clear that the expressed purpose and the necessary effect of the 1922 Act is to vest in the State of North Dakota, complete control and supervision over the marketing of all grain and that in this respect the Act is identical with the 1919 Act, which has already been declared a violation of the commerce clause of the Federal Constitution, but a comparison of the specific provisions of the new Act with those of the

old Act, insofar as they concern the more objectionable features of the old Act, will indicate clearly that no substantial change has been made.

MARGINS.

The 1922 Act, like its predecessor, gives the State authorities the right to regulate and control the marketing of all grain in North Dakota, including the determination of the price which must be paid for grain bought in that State. Under the power thus granted, the movement of grain from the State of North Dakota may be curtailed or even prevented. Section 4 of the Statute which was adopted to replace the unconstitutional 1919 Act, provides that the State Supervisor shall "in a general way, investigate and supervise the marketing of same (grain) with a view of preventing * * * unreasonable margins of profit." Obviously the only way of preventing unreasonable margins of profit is by a determination of a reasonable margin and the adoption of regulations which will prevent grain buyers from making any margin greater than the one so determined. The Act confers on the State Supervisor ample power to enforce his views as to what constitutes a reasonable margin. It is not necessary that the taking of an unreasonable margin should be made a criminal offense. It is sufficient that the State official who is charged with the duty of preventing unreasonable margins, has it within his power to revoke the license of any buyer who does not conform to his views on this subject as expressed in the regulations he may make. Regulation of the margin of profit is necessarily a direct regulation of the very act of buying grain which this Court has definitely determined to be a part of interstate commerce in grain and is therefore beyond the power of the State.

If there were any doubt as to the purpose and effect of the provisions already referred to, as conferring on the State Supervisor the power to regulate margins of profit, Section 17 of

the new Act removes any such doubt. It confers on the State Supervisor "the duties and obligations *which were formerly performed by the State Inspector* of grades, weights and measures and all the obligations placed upon him by law." The office of State Inspector of grades, weights and measures was created by the 1919 Act and the fact that that Act authorized him and made it his duty to establish reasonable margins, was one of the features of that law which was emphasized by this Court in holding it unconstitutional in the Lemke case. The new law not only recites in its preamble that it is designed to accomplish the same end as the law previously declared unconstitutional, but by this last section, brazenly re-enacts practically the entire 1919 Statute.

It is not possible to read into the language of this Section 17 any limitation whatsoever. The draftsmen were not content to confer upon the State Supervisor the duties which were conferred on the State Inspector of grades, weights and measures *by law.* Such a provision might conceivably carry only such duties as were conferred by Statutes which had not been repealed or declared unconstitutional. But the Court will note that in addition to the duties placed upon the State Inspector of grades, weights and measures *by law,* the State Supervisor, under the new Act, is also charged with all the duties and obligations *which were formerly performed by the State Inspector.* This leaves no possible escape from the conclusion that the new Act is designed and intended to substantially re-enact the old law.

LICENSE.

The 1922 Act, like the former law, prohibits anyone from buying grain in North Dakota until such grain has been inspected and graded by someone licensed by the State of North Dakota. This, in practice, requires everyone desiring to buy grain in North Dakota for shipment out of the State to first take out a license from the State and submit to all State rules and regula-

tions. It thereby interferes with and places a direct burden upon interstate commerce.

In this respect, the new Act is identical with the 1919 law with the single exception that no license fee is expressly charged. We have already indicated, however, in the statement of facts that this is simply and obviously a ruse. It is apparent that the administration of this Act will require substantial funds. No provision is made for supplying these funds other than a small initial appropriation and the increase in the warehouse license fee. It will not be disputed that the warehouse license fees will in practically every instance, be paid by the buyers of grain. As the grain trade is conducted in North Dakota, it is invariably the buyer of grain who conducts the grain elevator and warehouse. He therefore occupies a dual capacity and the new Act, by increasing the fee which he is required to pay as a warehouseman, raises funds to enforce against him, as a buyer, the rules and regulations established by the State in an attempt to control the marketing of grain. Under these circumstances, it is idle to contend that the buyer is not required to pay for his license to grade grain.

The new law is, in this respect, so far as its effect and result are concerned, simply a re-enactment of the 1919 Act. It in fact requires as a precedent to buying grain in North Dakota that the buyers shall obtain a license from the State of North Dakota to grade grain and shall then act in conformity to the rules and regulations established by the State, including such rules as may be established relating to margins of profit, payment for dockage and other essential elements in the purchase of grain. It will not be claimed that in practical operation under this Statute, there will be any one at country stations other than the buyers for the different elevators who will be licensed to grade grain. The plan of this Act is just as clearly to license the buyers as was the plan of the 1919 Act. Under the old Act, no grain was graded except by buyers. It necessarily follows that

if a man connected with an elevator desires to buy grain at all from producers at country stations in North Dakota, he must take out a license because there is no other practical way to buy grain. In construing the law, its practical operation must be considered, and, considering it in this manner, the license provisions are a clear and direct burden on interstate commerce.

It has repeatedly been held that a State cannot require a license as a condition to engaging in interstate commerce.

Robbins v. Shelby Taxing District, 120 U. S. 489.

Brennan v. Titusville, 153 U. S. 289.

The Robbins case above, involved a State Statute requiring drummers not having a regular place of business in the taxing district to take out a license from the State. This Statute was held invalid.

In the Brennan case above, the Court had under consideration an ordinance of the City of Titusville requiring persons canvassing or soliciting orders for goods within that city to procure a license. Brennan was taking orders for pictures to be made at Chicago, without a license. He was fined and convicted for violating the ordinance. This Court reversed the decision of the State Court, Mr. Justice Brewer saying in part:

> "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that *nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.* * * *
>
> It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible."

This decision refers to a number of the prior decisions of the Court sustaining the principle announced in the Brennan case. In the Brennan case emphasis is placed on the fact that the interstate commerce involved was in unchallenged subjects of commerce, not dangerous to the health, morals or general welfare of the community.

From an examination of these cases and others referred to it is apparent that the line between the proper exercise of the police power of the State and an unwarranted interference with interstate commerce can only be drawn after a reference not only to the provisions of the Statute but to the subject matter involved. It further appears that the line must be drawn by the Federal Court and that the State cannot by claiming that a Statute is passed for a purpose within its police power bind the Court having the final right to determine whether in fact the law is an exercise of the police power only indirectly and incidentally affecting interstate commerce or a direct burden on, or an interference with, interstate commerce.

In our case the commerce involved is in grain, especially wheat. Nothing in the nature of the commodity can suggest the necessity of a state police regulation. In this respect it differs from statutes relating to the inspection of livestock or meats, or milk, or prepared articles of unknown ingredients, on which the appellants so largely rely. Even as to State regulations of commerce in these articles the court often determines that the protection of health is remote, and that the interference with commerce is direct and holds the law invalid.

State v. C. & G. W. Ry. Co., 125 Minn. 332.

Minnesota v. Barber, 136 U. S. 313.

The provisions regarding the licensing of buyers and the regulation of the marketing of grain must not be confused with the regulation of the handling of grain in public warehouses. The Statutes of North Dakota, other than the Act here in question, fully regulate and require licenses for the operation of elevators

and public warehouses in that State (Sections 3107, 3112 to 3117, Compiled Laws 1913). They require a person operating a warehouse to pay an annual license fee and furnish a bond conditioned on the faithful performance of his duties as public warehouseman. His warehouse is subject to inspection by the State authorities. Any discrimination in the matter of handling grain in such warehouse is prohibited. Provision is made for the issuance and terms of warehouse receipts and the rates to be charged for storage are fixed. Reports are also required showing the business done by such warehouses. The validity of such provisions is not questioned. They regulate a local instrumentality and only indirectly affect interstate commerce. Thus entirely outside the present Act, which in effect, requires buyers of grain to take out licenses from the State, the State has fully exercised its police power by the provisions which are general throughout the grain growing States and are designed to safe-guard and regulate the handling of grain through public warehouses.

The fact that, in effect, the buyer is compelled by the new law to pay a fee to the State is not the only burden which the provision for a buyer's license places on interstate commerce. The applicant for such a license must satisfy the State Supervisor that he is qualified and competent. On this question, the State Supervisor exercises his discretion in the first instance and may refuse a license. Furthermore, an applicant must agree to abide by all the rules and regulations concerning the marketing of grain, including any regulations which the State Supervisor may establish as to the margin at which the licensee may buy grain and the rule requiring a specific payment for dockage at the seller's price or a return to the seller of a like amount of dockage. The licensee must consent to the forfeiture of his license for a violation of any rules of the State department. Thus the law not only requires as a condition to buying grain in North Dakota, the payment of a license fee and

the taking out of a license, but it requires the licensee in addition, to agree to allow the State to fix a price at which he may buy grain and to interfere with and regulate the manner in which he may engage in interstate commerce in grain. A more direct interference with interstate commerce is inconceivable and cannot be justified as an attempted exercise of the police power of the State.

Dockage.

The present grain grading Statute, like its forerunner, requires a payment specifically for dockage contained in grain, at a price to be fixed by the seller, or the return of a like amount of dockage to the seller. The provision of the new law is even more specific and exacting than the provision of 1919 Act in this regard. Section 4, after providing for the establishment by the State Supervisor of grades, weights and measures, requires that "in establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer."

This provision is a direct interference with the right to contract and the right to purchase grain freely in interstate commerce. This Act was drafted and passed with a full knowledge and understanding of the manner in which the similar provision of the 1919 law had been interpreted by the State authorities. It clearly appeared from the record in the Lemke case that, as so interpreted, the Statute requires absolutely a specific payment for dockage regardless of the contract between the seller and buyer for the sale and purchase of grain and regardless of whether or not, in the price paid for the grain, the value of dockage had been taken into consideration. Even long after grain has been purchased and re-sold, the purchaser may be required to pay the seller for the dockage contained in the grain

at the "local market" price or be required to return to the seller a like amount of dockage. The "local market" price was consistently interpreted to mean the price fixed by the seller so that the purchaser merely has the option to either pay the price demanded by the seller or to return a like amount of dockage, and in case the question is not raised until after the sale is completed, it places the purchaser absolutely at the mercy of the seller. Any law which subjects a purchaser to an obligation to pay an amount which is determined in some manner without consulting him, to be the market value of a product, necessarily interferes with the right to contract and will necessarily interfere with the free purchase and movement of such commodity.

The requirement of a specific payment for dockage is enforceable not only by virtue of the general power conferred on the State Supervisor and the specific provisions of the Statute regarding dockage, but also through the power vested in the State Supervisor to revoke the buyer's license and to prevent a rebellious buyer from continuing his business of buying grain in North Dakota for shipment to and sale in Minnesota. This is clearly an interference with interstate commerce.

The alternative provision that the buyer must return dockage to the seller is even more arbitrary and interferes to an even geater extent with the right to freely engage in interstate commerce in North Dakota grain. This seems too apparent for argument. The only conceivable means of separating the dockage from the grain is by means of expensive cleaning apparatus and machinery. In order to take advantage of this alternative, the buyer must install in his elevator this expensive apparatus. To impose this obligation on the buyer involves a direct and very substantial burden on his interstate business. Furthermore the screening of grain, particularly during the busy season, slows down the handling of grain through the elevator and interferes with its proper and advantageous use by the owner.

No analogy can be drawn between a law requiring a person

buying grain in interstate commerce to screen it as a part of the very transaction of purchase and a law requiring the owner of a coal mine to screen coal before weighing the same. Such an analogy was suggested by Justice Brandeis in his dissenting opinion in the Lemke case. We respectfully submit, however, that there is a real and vital distinction between these situations. The entire process of mining coal is subject to the police power of the State in which it is carried on. It is subject to regulation under this power even though it be a direct and burdensome interference with the operation. It has never been questioned but that the State can regulate the mining of coal within its borders. It can not, however, directly regulate or burden any transaction which is a part of interstate commerce in grain, even though that transaction takes place within its borders.

Bonds.

The present North Dakota Grain Grading Act contains at least one requirement, which it attempts to impose as a condition precedent to the purchase of grain in interstate commerce and which constitutes a direct and burdensome interference with that commerce, in addition to the conditions and burdens imposed by the 1919 Act, namely, the requirements of Section 9, of the 1922 Act that any buyer of grain must furnish a bond running to the State in an amount sufficient to cover the value of all farm products bought by such buyer and not paid for in cash in advance. The grain raising states invariably require from grain elevators, warehouse bonds. In this they are entirely justified on the well recognized principle already referred to that a warehouse is simply a local instrumentality, which is subject to State regulation. No precedent, however, has been found for the attempt on the part of the State of North Dakota to dictate the terms on which a sale of grain in interstate commerce shall be made, which is reflected in the requirement of

the new law that all buyers furnish bonds to protect sellers who see fit to sell on credit.

It is inconceivable that the State of North Dakota should refuse to listen to this Court when it is told that it cannot dictate or directly regulate the terms on which sales of grain are made in North Dakota, and yet that is exactly what the State is doing. In the Lemke case, this Court expressly held that the State of North Dakota could not lawfully determine the price or terms on which grain should be sold in that State, and in spite of this holding, the State has now not only substantially re-enacted the former law, but added to it this provision requiring a bond to protect credit sales.

The practical operation of this provision is manifestly unreasonable. Grain sold and shipped to a buyer at a terminal market with draft attached to the negotiable bill of lading would not be grain purchased and paid for in cash in advance, and yet before a buyer could so purchase grain, he must give a bond to the State of North Dakota to cover the value of such grain. No matter what other security or assurance of payment a buyer may give a seller, this new Statute requires a bond. Such situations are obviously beyond the realm of reason. But whether reasonable or not, the provision for such bond is a most direct and burdensome interference with the free movement of grain in interstate commerce and as such is beyond the power of the State.

THE NORTH DAKOTA STATUTE REQUIRES THE GRADING OF ALL GRAIN BOUGHT OR SHIPPED WITHIN THE STATE SUBJECT TO STATE SUPERVISION. THE BULK OF THIS GRAIN MOVES IN INTERSTATE COMMERCE. THE GRADING OF GRAIN MOVING IN INTERSTATE COMMERCE REQUIRES A UNIFORM RULE. A REQUIRED STATE GRADING INTERFERES WITH INTERSTATE COMMERCE.

In *Globe Elevator Company v. Andrew,* 144 Fed. 871, a Wisconsin Statute requiring all grain sold at Superior, Wisconsin,

to be in accordance with Wisconsin weights and grades was held invalid. To understand the exact question decided in this case, it is necessary to have in mind the situation existing as evidenced by the Minnesota and Wisconsin Statutes as well as the facts stated in the decision. Minnesota by Statute never attempted to *require* that grain should be bought and sold in Minnesota on Minnesota grades. The State established years ago a State Weighing Department and established Minnesota's standard grades of grain and created a State Grading Department. In order to give transactions in grain greater certainty and definiteness *traders in grain voluntarily* bought and sold that commodity according to Minnesota weights and grades. In time these standards were accepted by traders not only in Minnesota but throughout the grain producing states to the West and in the great terminal markets to the East. Superior, Wisconsin, an important lake port receiving large quantities of grain from railroads and shipping it out by boat, became dissatisfied with this customary buying and selling of grain on Minnesota weights and grades and desired the establishment and recognition of Wisconsin weights and grades. Reflecting this attitude of its important grain terminal, the Wisconsin Legislature created a Wisconsin Grain Weighing and Grading Department in 1905 (Laws of Wisconsin 1905, B-37, C-19, as amended by Laws Special Session 1905, B-19, C-12). This Statute *required grain bought and sold in Superior* to be weighed and inspected under the Wisconsin Statute *and prohibited any person from offering for sale or selling or delivering any grain in Superior under the Minnesota grading or under any other grading not provided in the Wisconsin Act.* The decision by the Circuit Court states:

"The important and vital question is whether these statutes are invalid as a regulation of interstate commerce. No doubt, the states are invested with large authority to pass inspection laws, indirectly affecting, and to some extent interfering with, commerce among the states. Many of such laws are not obstructive to commerce, but operate

as an aid or encouragement to it. Such are acts compelling carriers to promptly and safely carry and deliver interstate freight committed to their charge, securing safety in railroads and appliances, regulating bridges, improvement of navigable waters, regulating pilots, state quarantine, etc. *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. These laws mostly operate as local aids and instrumentalities of commerce, making it better and safer, and until Congress acts the states have ample power in all such matters, except where the subject admits only of one uniform plan or system, like the regulation of tolls on an interstate bridge, in which case the power of Congress is exclusive. *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *State Freight Tax*, 15 Wall. 243, 21 L. Ed. 146.

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The attempt of the Wisconsin statute to prescribe the standard of sale thus appears to be a regulation of commerce. It interferes with and attempts to destroy the grades on which the purchaser depends in making his purchase and succeeding sale.

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Freedom of commerce would seem to include the power to buy when and where and how the purchaser may choose. This power is burdened and obstructed by the legislation in question, directly conflicting and hostile to that of Minnesota. It interferes with that equality of rights between the states as to such commerce which was the design of the Constitution, not indirectly or remotely, but palpably and in an important and thorough manner. *Veazie v. Moor*, 14 How. 574, 14 L. Ed. 515.

It is also clear to me that so important a matter as fixing the grades by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress. Certainly it cannot readily be bought and sold according to two systems of inspection. It cannot be bought by one and sold by another. Conflicting state systems would only obstruct. *State Freight Tax*, 15 Wall. 243, 27 L. Ed. 146; *Welton v. Missouri*, 91 U. S. 280, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 273, 23 L. Ed. 543. Like the regulation of tolls on an interstate bridge, the fixing of a standard of sale for grain, moving in interstate commerce admits of only one uniform system.

* * * * * * * * * *

> Wisconsin, it is said, may lawfully take control of the inspection and weighing of grain held for sale, delivery, and storage within her territory, and may prohibit any other system. Assuming this to be so, and that Minnesota cannot rightfully stop and inspect grain in transit, yet the Legislature of Minnesota, in a spirit of rivalry, or desirous of vindicating its inspection system, might resort to retaliation. Wisconsin having made sales of grain void when made in Minnesota, that state might enact that it should be a crime for any person within her borders to sell any grain under the Wisconsin system. Wisconsin not to be outdone, follows with other drastic and ingenious reprisals."

This decision which was affirmed by the Circuit Court of Appeals in 156 Fed. 664, contains an exhaustive discussion of interstate commerce in grain and a comprehensive review of the decisions relating to the police power of the State and the exclusive power of Congress to regulate acts constituting interstate commerce. The discussion and decision in the main are directly applicable to the North Dakota Statute and the questions here involved and the reasoning was adopted as directly applicable to the North Dakota Act of 1919 by the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

Grain moves in interstate commerce through many states. It retains substantially a uniform character and condition throughout the movement. It may be bought and re-sold several times before it reaches its final destination. It seems clear, therefore, that the grading of grain is a subject lending itself to and requiring one uniform regulation. Recognizing this situation, Congress in 1916 passed the United States Grain Standards Act which requires all grain sold or shipped in interstate commerce to be inspected by licensed Federal Inspectors and to be by them graded according to duly established Federal standards.

At the time the Globe Elevator case, *supra*, was decided, the Federal Grain Standards Act had not been passed and yet

Judge Sanborn in that case, held that the attempt of the Wisconsin Statute to *compel* purchases in Wisconsin to be made according to Wisconsin grades was an interference with and a burden upon the usual established course of interstate commerce.

The mere fact that the Federal Government has now established grades cannot justify North Dakota in forcing a distinct system of inspection on interstate transactions.

If it is proper for North Dakota to make a compulsory inspection of grain while it is within the State of North Dakota, it would be equally proper for each state through which that grain comes to rest for transfer or for sale to require an inspection according to the rules of such state. Some plausible reason can always be assigned for a local interference with interstate commerce, but if the evil in fact exists, it does not call for the exercise of a State regulation but for a Federal regulation. It is to a matter requiring a uniform regulation. In matters within the exclusive jurisdiction of Congress it is for Congress to determine when and how the matter should be regulated. The absence of a regulation by Congress is a Federal determination that that regulation is not required. So it was said by Mr. Justice Field in *County of Mobile v. Kimball*, 102 U. S. 697:

> "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. *Some of them are national in their character, and admit and require uniformity of regulation*, affecting alike all the states; others are local, or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may* be mentioned all that portion of commerce with foreign countries or between the states which consists in the *transportation, purchase, sale and exchange of commodities.* Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transporta-

tion is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

And *in re Schechter*, 63 Fed. 695, Judge Sanborn states:

"Now, while there are certain subjects in their nature local, such as harbor pilotage, beacons, bridges, etc., regarding which a state may legislate when Congress has not, yet when the subject-matter is the sale of a well recognized article of commerce, such as vines, trees or shrubs, or any other well known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that Congress alone can prescribe. In all cases where Congress has passed no law regulating interstate commerce in any well recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of the state which prohibits or restricts it must be held to be in violation of the Constitution.

* * * * * * * * * *

This law imposes a restriction upon the sale of foreign grown trees by its very terms; and any law which imposes any vexatious or annoying restriction upon the sale of articles that are themselves sound articles of commerce must be held to be an interference with commerce, and thus in violation of the clause of the Constitution to which I have referred."

The State argues that the Federal inspection does not reach the purchase of grain at the country elevators. This same argument, like all other arguments now advanced by the State, was urged in support of the 1919 Act. Clearly Congress might provide any additional inspection of grain according to Federal standards. Presumably it has determined what

inspection it deems necessary. The uniform grades established by Federal authority are public and known throughout the country. The buyer and seller in North Dakota can each in the determination of the value of grain exercise their judgment as to the grade which will be given that grain when finally inspected by a Federal Inspector. The licensing of the *buyer by the State,* clothing him with a right and authority to grade grain bought from the producer, does not tend to safeguard the producer. It simply imposes upon interstate commerce a dual system of inspection, one lawful and one wholly unwarranted.

THE EXISTENCE OF A STATE POWER TO REGULATE PUBLIC WAREHOUSES DOES NOT IN ANY DEGREE TEND TO ESTABLISH A STATE POWER TO DIRECTLY REGULATE AND CONTROL THE MARKETING OF GRAIN IN INTERSTATE COMMERCE.

The State cannot under any guise impose a *direct* burden on or *control* interstate commerce or *fetter by conditions the right of individuals or corporations to carry on such commerce within the State.*

But beyond this, until Congress acts, the State may exercise within its borders its inherent power *although interstate commerce may thereby be indirectly affected.* These principles were applied and their applications distinguished in the two leading cases of

Munn v. Illinois, 94 U. S. 113.

Wabash, etc., Railway Company v. Illinois, 118 U. S. 557.

In the Munn case it was established:

Grain warehouses are devoted to a public use and are therefore subject to public control. They may be incidentally connected with interstate commerce but not necessarily so. They lend themselves properly to local regulation. Until Congress acts, the State in which a warehouse is located may exercise its governmental powers over it even though it thereby indi-

rectly affects interstate commerce.

In the Wabash case the Court definitely determined:

That the State power of regulations referred to in the Munn case did not extend to acts constituting an integral part of interstate commerce itself, or to those subjects related to interstate commerce requiring uniform regulation. The Court refused to sustain under the rule of the Munn case a state regulation which affected charges for interstate transportation.

In the Wabash case this rule laid down in *Hall v. Decuir*, 95 U. S. 485, is quoted and approved of:

> "But we think it may safely be said that State regulation which seeks to impose a direct burden on interstate commerce or interfere directly with its freedom does encroach on the exclusive power of Congress."

The distinction thus drawn has never been questioned or modified by the Federal Courts. Following *Munn v. Illinois*, different State regulations of public warehouses were sustained in

Budd v. New York, 143 U. S. 517.

Brass v. Stoeser, 153 U. S. 391.

Cargill v. Minnesota, 180 U. S. 452.

Merchants Exchange v. Missouri, 248 U. S. 363.

In all of these cases the question involved was the right of the State to regulate the conduct of public warehouses located within the State. In *Cargill v. Minnesota*, the State requirement of a license for a public warehouse was only sustained because:

> "*The Statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased.* The license has reference only to the business of the defendant at its elevator and warehouse." (Italics ours.)

Brass v. Stoeser sustained a North Dakota Statute requiring public warehouses to receive grain for storage at the rates established by the Statute. Even this Statute was sustained

by a bare majority of the Court, four Justices dissenting. *North Dakota still has this Statute.* The validity of this Statute establishing a complete regulation of public warehouses is not here questioned. The Statute of which we complain attempts an exercise of State power involving an entirely different subject. It regulates the buying of grain, whether at a public warehouse or elsewhere. It does the very thing, the absence of which is referred to in the Cargill case as sustaining the validity of the Minnesota Statute. The warehouse statutes of North Dakota are sustainable under the rule of the Munn and Brass cases. The State Statute regulating and controlling the marketing of grain is wholly independent of any warehouse regulation and is invalid within the rule of the Wabash case. The rule applicable to the North Dakota Statute regulating the marketing of North Dakota grain is the rule that the State cannot under any guise impose a direct burden on or control interstate commerce or fetter by conditions the right of individuals or corporations to carry on such commerce within the State. The two rules, with the distinguishing conditions, are clearly stated in the *Minnesota Rate Cases,* 230 U. S. 352, at 398, 399, 400, as follows:

> "The general principles governing the exercise of State authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden*, 9 Wheat. 1, 196.
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> "It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.
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> "The principle, which determines this classification, un-

> derlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of one authority and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains."

Notwithstanding the clear distinction between the two lines of cases and the fact that the Warehouse Acts were declared both by the Circuit Court of Appeals and this Court to be in an entirely different class from these North Dakota Grain Grading Acts, counsel for the State still insist on urging that the cases upholding such Statutes are authority for their position here. The answer lies in the opinions in those cases and in the opinion of this Court in the Lemke case. It was there said, in distinguishing *Merchants Exchange v. Missouri*, 248 U. S. 365, that:

> "The act there in question did not undertake to regulate the buying of grain in interstate commerce, nor to levy a license tax upon the privilege, nor to fix the profit which could be realized on grain bought, shipped and sold in interstate commerce."

Or as it was succinctly put by the Circuit Court of Appeals in the same case:

> "The existence of a state power to regulate public warehouses does not establish a state power to directly regulate and control the marketing of grain in interstate commerce, and authorities in support of the power to regulate warehouses are not in point."

An examination of the Missouri Warehouse Statute case clearly indicates that it merely sustains the regulation of public warehouses and that it has no application to the statute or the facts in this case. At page 366 Mr. Justice Brandeis states the question involved in the Missouri case as follows (*Merchants Exchange v. Missouri*, 248 U. S. 365):

> "A statute of Missouri relating to the inspection and weighing of grain, approved March 20, 1913 (Laws, Mis-

souri, 1913, pp. 354-373), and amended March 23, 1915 (Laws, Missouri, 1915, p. 302) declares that in cities of more than 75,000 inhabitants all buildings used for the storage or transferring of grain of different owners, for a compensation, shall be deemed public warehouses; and by Sec. 63 (p. 372) thereof, prohibits under severe penalties 'any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate * * * (for any) grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed, * * * or to make any charge for such weighing, * * * or weight certificates.'" * * *

He states the Court's decision as follows:

"First. Section 63 of the Act does not violate the Fourteenth Amendment. As the State Court has pointed out, the statute does not prohibit owners of grain from weighing it before it is sent to a public warehouse or after it is removed therefrom. But the issue of a private weigher's certificate in addition to the certificate of the public weigher might lead to embarrassment or confusion or prove a means of deception. The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To *require that goods received in or discharged from public warehouses shall be weighed by public weighers* and that no one else shall issue certificates of or make charges for weighing under those circumstances *is not an unreasonable or arbitrary exercise of the discretion vested in the legislature.*" (Italics ours.)

Clearly this Statute is sustained upon the principle announced in the Munn case that warehouses are devoted to a public use and that a warehouse located within the State is subject to regulation by the State even though some interstate commerce may pass through such warehouse.

The Missouri Statute, like the Minnesota Statute, considered in the Cargill case, the Illinois Statute considered in the Munn case, the Dakota Statute considered in the Brass case, does not purport to regulate generally *the buying or selling of grain,* does not *prohibit buying grain unless a license fee, a tax on the*

privilege, is paid, and clearly does not tend to sustain a State Statute regulating and controlling the marketing and distribution of grain through interstate commerce.

II.

THE 1922 ACT, LIKE THE 1919 ACT, CONFLICTS WITH THE UNITED STATES GRAIN STANDARDS ACT AUTHORIZING THE ESTABLISHMENT OF FEDERAL GRADES AND SERVICE AND REGULATORY ANNOUNCEMENTS NUMBERS 33 AND 46 ESTABLISHING THEREUNDER OFFICIAL GRAIN STANDARDS OF THE UNITED STATES FOR WHEAT, SHELLED CORN AND OATS.

The Federal Act, 39 Stat. L. 482, being Part B of the Agricultural Appropriation Act of August 11, 1916, Chapter 313, authorizes the Secretary of Agriculture, after investigation, to establish standards of quality and condition for different kinds of grain, to be known as the Official Grain Standards of the United States, and, under this authority, the Secretary of Agriculture has established such standards for wheat, corn and oats.

Section 4 of the Federal Statute prohibits the shipment or sale or agreement to sell grain described by the terms of the Federal grades unless such grain has been inspected and graded by a Federal Inspector.

Section 7 of the Federal Statute provides for licensing Federal Inspectors and authorizes the issuance of Federal licenses to persons duly authorized and employed to inspect and grade grain under the laws of any State which has a State Grain Inspection Department, but it further provides:

> "That no person licensed by the Secretary of Agriculture to inspect or grade grain or employed by him in carrying out any of the provisions of this Act shall, during the term of such license, or employment, be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

The Federal Statute thus affords an opportunity for the harmonious application of the Federal grades and inspection to grain moving in interstate commerce and State inspection of grain not moving between States. The State of North Dakota, however, did not in the 1919 Act and does not in the present Act see fit to conform to this provision of the Federal Statute. The necessary effect in practice of the North Dakota Statute is that all grain will actually be graded and inspected by persons interested in merchandising grain or by employees of grain elevator owners. It necessarily contemplates the issuance of State licenses to persons who are not qualified to hold Federal licenses.

Furthermore, as to all grain purchased in North Dakota, whether for export or for local consumption, the State inspection and the rules and regulations governing the State inspection, will be applied and enforced. Such a situation necessarily results in confusion and conflict. This objection to the North Dakota Grain Grading Act was urged in the attack on the 1919 Act, and although this Court did not consider it necessary to pass upon this question, the Circuit Court of Appeals specifically made this one of the grounds for holding the 1919 Act invalid. In this respect, there is no difference between the two Acts and Circuit Judge Carland's opinion regarding the conflict between the 1919 Act and the United States Grain Standards Act, is directly applicable to the 1922 Act. In Farmers *Grain Company of Embden* v. *Langer*, 273 Fed. 635, at page 651, he says:

> "There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then of course any attempt to regulate that commerce by the State of North Dakota is in direct conflict with the Grain Standards Act,

wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both acts ought not to be and cannot be enforced, without confusion and embarrassment as the State Inspector declared. Section 4 of the Grain Standards Act heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale, or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the act to or through any place at which an inspector licensed under the act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the Federal Act to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal Inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the State Inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws clearly in conflict, if they both have to do with interstate commerce.

As we have said before, the state law authorizes the State Inspector to establish grades for grain and the Secretary of Agriculture by the Grain Standards Act is vested with the same power. These powers are directly in conflict, if they both relate to interstate commerce in grain. The United States Grain Standards Act provides that no person licensed by the Secretary of Agriculture to inspect or grade grain during the term of such license or employment shall be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse. The state law provides that the term 'deputy inspector of grades, weights and measures,' within the meaning of the law, shall mean any

firm, person, company, corporation, or association that buys, weighs, and grades grain, seeds, and other agricultural products who holds a license issued therefor by the state inspector of grades, weights and measures. Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the Federal law, if the business is interstate commerce. It is useless to discuss further the matter of conflict, for the reason that, if both laws relate to the same subject, the state law attempts to regulate something that the State has no power to regulate, and, Congress having acted, the state law is in direct conflict with the Federal law."

DUAL INSPECTION CANNOT BE AVOIDED IF THE STATE AND FEDERAL ACTS ARE BOTH IN FORCE.—This results necessarily in over-lapping and conflicting regulations and unnecessary license fees, and imposes a substantial burden on every merchant engaged in commerce in grain. He must buy in North Dakota according to the North Dakota Statute and the rules and regulations promulgated thereunder by the State authorities. He must sell in Minnesota under the Federal Standards and the rules and regulations established by the Secretary of Agriculture. If he appeals any question arising out of the purchase of grain, his appeal goes to the State Supervisor and is disposed of within the discretionary power vested in the State authorities. If he appeals any question arising out of the sale of grain, his appeal is determined by the Federal authorities. At no point and by no process can he obtain one ruling or regulation covering both ends of his commerce in grain. The record in the Lemke case clearly indicates the uncertainty, inconvenience and hardship resulting to the grain buyers by reason of this situation during the period when the 1919 Act was in force. Under the old law, it frequently occurred that North Dakota grain, bought in interstate commerce was given a certain grade by the State Inspectors and the same grain when sold at the terminal markets outside of the State, was given a different grade under the system of Federal inspection. This dual inspection necessarily resulted in diverse grading

and makes commerce in grain uncertain and devoid of a single uniform regulation. As each system of grading independently determines the grade of grain, each necessarily conflicts with the other. There is no process by which a subsequent Federal inspection can overrule or change the grade given by the State inspection. This conflict is not a theory, but a continually existing fact.

THE DOCKAGE REQUIREMENTS of the North Dakota Statute necessarily lead to a conflict with the Federal System of Grading. Under the State law, the buyer is compelled to make a specific payment for dockage. At the terminal markets, he receives no payment for dockage as such, although sometimes he receives a premium price for wheat containing a large amount of dockage. The Federal rules and regulations do not require any payment for dockage, and it is the uniform custom at the terminal markets not to make any specific payment for dockage nor to return the dockage to the seller. Thus again the commerce in grain is subject to two contrary rules and regulations.

A DIRECT VIOLATION OF THE FEDERAL STATUTE results from the fact that under Section 3113 of the Compiled Laws of North Dakota for 1913, warehouse receipts issued by an elevator in North Dakota must provide for the delivery of the wheat by weight and grade at any terminal market upon payment of the freight rate between the elevator and the terminal. These warehouse receipts are negotiable. The grain represented by such a receipt may be sold and delivered at Minneapolis by the negotiation of the warehouse receipt. The Federal Statute prohibits a sale of grain described by the terms of the Federal grades without an inspection first being had by a Federal Inspector. A transaction such as that just described would result in a direct violation of this provision of the Federal Statute, although it is in exact accordance with the North Dakota Statute and the established form of the North Dakota warehouse receipts.

THE TWO SYSTEMS INVITE AND CAUSE INNUMERABLE CONFLICTS.—It is apparent that endless conflicts will arise through the enforcement of the two inspection systems. The State Department is vested with and exercises plenary power to control every step in, and incident of, the purchase of grain. It fixes prices, requires payment for dockage, establishes rules and regulations to which it binds the buyers of grain by its licenses, hears the complaints of the sellers, requires additional payment for or the return of dockage in response to such complaints, requires bonds to protect the farmer who sells on credit, revokes licenses and exacts a license fee from the buyers of grain to support it and to supply the funds required to enable it to thus interfere with and hamper interstate commerce in grain. Obviously, the purchaser of grain in North Dakota is between two millstones independently operated and controlled.

THE ENTIRE STATE STATUTE IS INVALID.—This is not a case involving a Statute which is, in the main, valid although it contains certain invalid provisions. The purpose of this Statute is made clear by its own language. It is designed to control the marketing of grain in North Dakota. If it cannot succeed in doing so, it must fail as an entirety. It is a unit and is either all valid or all invalid.

This Statute, in effect, requires a license for the privilege of engaging in interstate commerce. The fee exacted for this license is a tax on that privilege and whether it be large or small, the Statute requiring it is wholly invalid. Under some Statutes requiring a license, it has been said that the licensee is not bound to comply with unlawful requirements and the Statutes have therefore been upheld. This is only because the requirement of the license for the purpose involved in such cases is valid in the first instance. The purpose for which the North Dakota Act requires a license is State control of interstate commerce and cannot under any circumstances be upheld.

Those cases which hold that the exercise of the police power

of a State upon a subject over which Congress has *concurrent* authority is sustained if the State Act does not conflict with, but is in aid of, Federal Legislation which does not purport to occupy the entire field, are not in point. A case illustrating the application of this principle is *Asbell v. Kansas,* 209 U. S. 251, where at page 258, this Court stated:

> "But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with national law. Rule 13, issued by the Secretary of Agriculture under the authority of the Statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none."

It is apparent that the North Dakota Statute is framed on an entirely different principle. It insists that the determination of grades must be made by State Inspectors as a condition of grain moving in interstate commerce. The mere adoption of the terms of the Federal Grades is idle. It is the compulsory inspection by State officials that actually establishes the grade and this compulsory inspection is directly in conflict with the Federal authority.

Nor can it be claimed in this case that the North Dakota Statute covers matters not covered by the Grain Standard Act as was the situation in *Savage v. Jones,* 225 U. S. 501, *Reid v. Colorado,* 187 U. S. 137, and other similar cases.

The fact that the dual inspection occurs in different states is not significant. Congress presumably when it undertook to regulate the inspection of grain and the establishment of grain standards provided for such inspections as it deemed necessary. Both acts relate to grading grain in the course of a unit of interstate commerce.

The usual Warehouse Act of the type sustained in *Munn v. Illinois,* has been held not in conflict with the Grain Standards Act (*Merchants Exchange v. Missouri, supra*), but this was on the stated ground that the State Act applied only to the weighing and warehousing of grain and did not purport to establish an exclusive system of grading an inspection applicable to all transactions in grain. Justice Brandeis makes this distinction clear when he says in that case:

> "That Act (the Federal Act) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain."

Upon the elementary principle that if there is a conflict between the two Statutes the Federal law is supreme, it is scarcely necessary to refer to authorities,—the Federal Constitution and the laws enacted thereunder being the supreme law of the land.

In the *Minnesota Rate Cases,* 230 U. S., at 402 and 403, it is stated:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them.
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> "In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own."

A state law which interferes with interstate commerce is not

made valid by the fact that it also properly regulates intrastate transactions. The statement of this point demonstrates its correctness.

Bacon v. Illinois, 227 U. S. 504.
Railroad v. Husen, 95 U. S. 465.
Minnesota v. Barber, 136 U. S. 313.
Brimmer v. Rebman, 138 U. S. 78.
Patapsco Guano Company v. North Carolina, 171 U. S. 345.

From the supremacy of the Federal Statute it also follows that a regulation by Congress of interstate commerce is valid even though it thereby affects intrastate subjects. Congress may occupy the entire field of interstate commerce and completely regulate that commerce.

Brown v. Maryland, 12 Wheat. 419.
United States v. Colorado & Northwestern Railway Company, 157 Fed. 321.

We submit the conflict between the two Statutes is actual and substantial and that because of this conflict the North Dakota Statute is invalid.

III.

THE 1922 ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THE SAME MANNER AS THE 1919 ACT.

The North Dakota Statute authorizes and empowers the State Supervisor to revoke the license of any buyer, and thereby prohibit him from continuing his business of buying grain in interstate commerce, without any notice and without any opportunity afforded for a hearing. The provision for an appeal to the Court from arbitrary action in this does not afford the buyer sufficient protection. He would have the right to resort to the Courts to prevent such action whether there were

any provision for an appeal or not. In the meantime, however, he is deprived of the right to carry on his business and if such action were taken in the midst of the busy crop moving season, he would lose practically a year's business before the wrong could be remedied by the Courts.

To prohibit in this manner the profitable use of elevators is just as much a confiscation and destruction of property as it would be for the State to actually take possession of the elevator itself. While in the earlier cases there is some confusion as to what circumstances justify a summary confiscation or destruction of property under the due process clause, it has now become well established that the nature of the property is the determining factor in each case and that in order to justify such a confiscation or destruction, the State must be prepared to show that the property is dangerous to the safety or health of the community, otherwise it can only be condemned or destroyed by legal proceedings with due notice to the owner.

Sentell v. New Orleans, etc. R. R. Co., 166 U. S. 698.

1. An elevator is property of substantial value. The business of conducting it is not a public nuisance. The property is obviously of such a nature as to require legal proceedings for its confiscation and, within the rule cited above, the taking of such property or depriving the owner of the use of it without legal proceedings deprives the owner of his property without due process of law as guaranteed by the Fourteenth Amendment.

2. The limitations and restrictions placed by the North Dakota Statute on the terms on which grain may be bought in North Dakota, constitute an unlawful restriction of the liberty of contract guaranteed by the Fourteenth Amendment. As already indicated, the North Dakota Statute provides for, or contemplates rules and regulations providing for, the fixing of the price at which grain can be purchased in North Dakota, the specific payment for dockage or its return to the

seller, the licensing of buyers as a condition precedent to their right to purchase grain and the giving of security by the buyer whenever he purchases on credit. In short, the Statute purports to make the contract between the buyer and the seller for them and without regard to their wishes. If this Statute remains in force, no grain can be bought in North Dakota excepting under a contract of purchase, every important term of which is fixed by, or subjected to regulation by, the State authorities. Such a situation is a clear violation of the constitutional guarantee of liberty of contract.

In the insurance case (*German Alliance Insurance Company v. Kansas*, 233 U. S. 389), and in the rent cases (*Block v. Hirsh*, 65 L. Ed. 531, and *Marcus Brown Holding Co. v. Feldman*, 65 L. Ed. 539), we find the border line of the legislative power to regulate contracts. These decisions rest on existing situations. In the insurance case, because of the nature of the business, a few companies had obtained control of the rates of insurance and all persons desiring protection were obliged to deal with these companies. This condition does not exist in the grain business. Twenty-two hundred elevators compete with each other in buying grain. Many of them are farmers' co-operative companies. These co-operative companies establish the conditions under which grain is bought at country elevators. A producer is not dependent upon the country elevator. He may ship his grain to a terminal market. There is not and cannot, in the nature of things, be a control of market conditions by grain buyers similar to the control of insurance rates by the large companies. The rent cases involved an extraordinary and peculiar public hardship and necessity. Legislation regulating the marketing of grain falls outside the boundary line of legislative control of contracts established by the insurance and rent cases.

We submit that the North Dakota Statute constitutes an infringement of rights guaranteed by the Fourteenth Amendment as well as a direct and substantial burden on interstate com-

merce and a source of conflict with the United States Grain Standards Act.

IV.

Appellants' Argument.

By far the greater portion of the appellants' brief is directed toward persuading this Court that an evil exists in the conditions surrounding the marketing of grain in the Northwest, which calls for legislative interference. As already stated, we do not concede this position. On the other hand, we are not here to argue this question. It is totally immaterial on the issues raised in the present case. This was clearly pointed out by this Court in the Lemke case but nevertheless the appellants still insist on injecting into the case both in their pleadings and in their brief, a further discussion of this point.

The only purpose which appellants' allegations of existing evils in the grain trade serve is to illustrate even more clearly the effect which the State is seeking to accomplish by the Grain Grading Act. The Court will note that although the appellants attempt to justify the 1922 Act on the ground that it regulates only the *grading* of grain, an operation which it is claimed necessarily takes place before the sale of the grain, this is merely a subterfuge. The real factor in which the State of North Dakota is interested is the *price* which the farmer gets for his grain. This is clearly brought out in the appellants' brief. We quote the following passages as a few instances of the State's position:

> "It is at the local elevator point that the disposition of most of the grain raised is made, and it is therefore of the utmost importance that the maximum of protection be extended at such marketing point in order that the producer in particular be afforded fair treatment *and proper returns*" (Appellants' Brief, p. 2).
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> "In view of the importance of the grain business and the vital dependence thereon by the entire State and in view of the further fact that the returns of the great ma-

> jority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the *price* for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the grading of grain becomes at once manifest" (Appellants' Brief, p. 12).

Moreover, it is admitted by the appellants in their brief that the avowed purpose of the North Dakota Act is to regulate interstate commerce. They say on page 8 of their brief:

> "It is the intention of said Act that all grain *included within interstate commerce* should be graded and inspected in accordance with the grades fixed by the Secretary of Agriculture under that Act. This is the single great purpose of the Federal Act. * * * It is our contention here that the present Act is a State inspection measure, solely calculated to assist, supplement and carry out to the fullest extent, through the police power of the State, the aims and purposes of the Federal Act."

Insofar as the 1919 and 1922 Acts affect and operate directly on interstate commerce, the appellants attempt to cite five alleged differences between the two Acts. These differences are either purely theoretical and furnish no basis for a distinction, or else they are not supported by an examination of the provisions of the two Acts.

(1) Appellants state "the 1919 Act was most vitally different from the present Act in that the 1919 Act required such license in order to either *buy or grade grain*, whereas the present Act simply requires a license to be authorized to *grade* grain" (Appellants' Brief, p. 11).

We have already seen that this is in fact a difference without a distinction. The manner in which commerce in grain is carried on is an existing fact which cannot be disregarded. Under this existing state of facts, it is futile to draw such a distinction. Grain must be graded by the buyer and not otherwise. To require a license to grade grain is in fact to require a license to buy grain. This is repeatedly admitted by the appellants in their brief and will not be disputed. This being

so, any distinction between the 1919 Act and the 1922 Act on this ground becomes a mere verbal distinction without any practical force or effect whatever.

(2) Appellants further state: "under the old Act, grain buyers were made deputy State Inspectors, while under the new Act they are simply required to hold a license."

It is difficult to conceive that counsel seriously contend that there is any such magic in a name. What difference does it make what the State of North Dakota proposes to call its licensees? The fact that they are not given any name under the new Act does not relieve them of any of the obligations imposed by their license. These obligations remain the same and it is these obligations, and not the title conferred on them, that renders the license requirement obnoxious.

(3) Appellants further state: "under the old Act, the rules and regulations made by the State Inspector were wholly in control. Under the new Act, in effect, any rules and regulations made under the said Act are subordinated to rules and regulations by the Secretary of Agriculture."

Just what provision of the new Act brings about this effect is not obvious. The only regulations of the Secretary of Agriculture which are specifically adopted by the new Act, are those which establish Federal grades. We do not find anything in the North Dakota Act which subordinates the rules and regulations of the State Department to those of the Federal Department in any other respect.

(4) Appellants further state: "under the old Act, a license fee was required, while under the new Act a license is issued without charge."

Again appellants are pointing out a difference in theory only and not in fact. We have already indicated that the administration of the Grain Grading Act is supported solely by the increase in the warehouse fees, that buyers are necessarily warehousemen and that the collection of an additional and excessive fee from the buyer as a warehouseman is merely an in-

genious method of compelling the buyers to provide the funds necessary to administer the Grain Grading Act as a whole.

(5) The appellants further state: "under the old Act authority was given to the Inspector to fix the margin of profit. * * * Under the new law, no authority is given to fix a margin or to punish for an unreasonable margin, the power of the State Supervisor being simply to investigate on that subject in order that information as to the margin may be forthcoming for the information of all persons interested."

This statement carefully overlooks the fact that the law in terms authorizes the State Supervisor to *supervise* as well as to investigate the subject of margins and that it is made his duty to exercise this power *with a view to preventing unreasonable margins.* It also overlooks the fact that the Supervisor is vested with all the duties *formerly performed* by the State Inspector of grades, weights and measures.

The appellant has cited no cases other than those illustrating principles on which we have already commented. They rely principally on three types of cases: First—those upholding the validity of the ordinary warehouse Statute; Second—those upholding State Statutes on a subject over which the State and the Federal Governments have *concurrent* jurisdiction where the Federal legislation on the subject has not occupied the entire field; and third—those upholding State Statutes requiring inspection of articles, such as food, oil, etc., which are inherently dangerous to the health and welfare of the community. We have already commented on all three of these types of cases and have found that none of them are in the least in point on the present issue.

The appellants have totally failed to show any substantial distinction between the 1919 Act and the 1922 Act. In spite of what is said on page 5 of appellants' brief, this is what led the trial Court to grant a temporary injunction. We submit that an examination of the two Statutes in the light of admitted facts will justify no other conclusion and that the order

of the trial Court granting a temporary injunction should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 34.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLEES' BRIEF UPON RE-ARGUMENT.

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OCTOBER TERM, 1924.

No. 34.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, BERWICK FARMERS GRAIN COMPANY, HAMPDEN FARMERS ELEVATOR COMPANY, GRANDIN FARMERS GRAIN COMPANY, WALHALLA CO-OPERATIVE ELEVATOR COMPANY, GLENFIELD CO-OPERATIVE ASSOCIATION, FARMERS CO-OPERATIVE ELEVATOR COMPANY OF CANDO, BENEDICT FARMERS CO-OPERATIVE ELEVATOR COMPANY, FARMERS ELEVATOR & MERCANTILE COMPANY OF ROGERS, CAYUGA FARMERS ELEVATOR COMPANY, LYBECK GRAIN COMPANY, I. L. BERGE ELEVATOR COMPANY, REGAN & LYNESS ELEVATOR COMPANY, KENSAL FARMERS ELEVATOR COMPANY, CHAMLEY BROS. GRAIN COMPANY, GWINNER FARMERS GRAIN COMPANY, FREEBORN ELEVATOR COMPANY, HAZEN GRAIN COMPANY, ELDRIDGE FARMERS ELEVATOR COMPANY, CARRINGTON GRAIN COMPANY, PINGREE GRAIN COMPANY, FARMERS GRAIN COMPANY, CARGILL ELEVATOR COMPANY, OCCIDENT ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF NORTH DAKOTA, W. M. NODDINGS, DOING BUSINESS AS THE NODDINGS GRAIN COMPANY, L. L. KRUCHTEN, DOING BUSINESS AS THE PERTH ELEVATOR, J. C. SMITH, DOING BUSINESS AS ALEXANDER GRAIN COMPANY, F. M. COOK, DOING BUSINESS AS THE WOODWORTH GRAIN COMPANY, JOHN A. AIRD, ALEXANDER HARCHANKO, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, ROBERT FLEMING, JAMES WHELAN, PIERCE BLEWETT, DOING BUSINESS AS THE STAR ELEVATOR COMPANY, HANS NEILSON, DOING BUSINESS AS THE ELK VALLEY FARMS COMPANY, E. H. RAY, ARNOLD BROS., C. H. SHELDON, LOUIS GJERE, DOING BUSINESS AS THE CANDO GRAIN COMPANY, SCHILLING & KRUGER, O. B. SORENSON, V. W. STEELE, DOING BUSINESS AS JUD ELEVATOR COMPANY, JOHN SOUTHALL, J. A. FRANK, H. C. SORENSON, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, JOHN BIBELHEIMER, DOING BUSINESS AS THE WASHBURN GRAIN COMPANY, N. O.

PARSONS, DOING BUSINESS AS THE INDEPENDENT GRAIN COMPANY, A. C. ANDREWS, DOING BUSINESS AS THE ANDREWS GRAIN COMPANY, ALL IN THE STATE OF NORTH DAKOTA, AND ACME GRAIN COMPANY, ATLANTIC ELEVATOR COMPANY, GEORGE C. BAGLEY ELEVATOR COMPANY, COLUMBIA ELEVATOR COMPANY, DODGE ELEVATOR COMPANY, EMPIRE ELEVATOR COMPANY, GREAT WESTERN GRAIN COMPANY, IMPERIAL ELEVATOR COMPANY, MILLER ELEVATOR COMPANY, MINNEKOTA ELEVATOR COMPANY, MONARCH ELEVATOR COMPANY, NATIONAL ELEVATOR COMPANY, NORTHLAND ELEVATOR COMPANY, OSBORNE-MCMILLAN ELEVATOR COMPANY, POWERS ELEVATOR COMPANY, RUGBY ELEVATOR COMPANY, ST. ANTHONY & DAKOTA ELEVATOR COMPANY, VICTORIA ELEVATOR COMPANY, WINTER-TRUESDELL-AMES COMPANY, WOODWORTH ELEVATOR COMPANY, AND INTERNATIONAL ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF MINNESOTA, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLEES' BRIEF UPON RE-ARGUMENT.

STATEMENT OF CASE.

This case involves the validity of a statute of North Dakota known as the North Dakota Grain Grading Act, which was passed as an initiated measure at a general election held in the State of North Dakota on November 7, 1922. The appellees herein brought an action in the Federal District Court to restrain the enforcement of that law, on the ground that it was invalid because in conflict with the Commerce Clause and the Fourteenth Amendment of the Federal Constitution, as well as with the United States Grain Standards Act. The appellees asserted that the action thus brought was ruled—as to the conflict with the Commerce Clause—by the decisions of this court holding a like statute invalid, i. e., *Lemke v. Farmers Grain*

Company of Embden, N. D., decided February 27, 1922, and reported in 258 U. S. page 50, and *Lemke v. Homer Farmers Elevator Company, et al.*, decided the same date and reported in 258 U. S. 65; and—as to the conflict with the United States Grain Standards Act—by the decision of the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

The court below, consisting of Circuit Judge William S. Kenyon and District Judges J. W. Woodrough and J. S. Elliott, sitting as the District Court, pursuant to Section 266 of the Judicial Code, granted a temporary injunction against the enforcement of this initiated law. The present appeal questions in this court the correctness of that ruling.

This case was originally on the calendar on the October Term, 1922, and was set down for argument April 30, 1923, at which time briefs were filed and the case was argued. Thereafter, and on January 5, 1925, this court restored the case to the October Term, 1924, calendar and set the case for re-argument "on all the questions involved, particularly including the following:

> No. 1. Whether the North Dakota statute of 1922 differs materially in its provisions and operation from the statute of 1919 which was held invalid by this court in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Lemke v. Homer Farmers Elevator Co.*, 258 U. S. 65.
>
> No. 2. Whether and to what extent section 17 of the statute of 1922 gives effect to and continues in force the provisions of the statute of 1919.
>
> No. 3. Whether and in what particulars the statute of 1922 encroaches upon the field of regulation occupied by the United States Grain Standards Act or conflicts with that act or with its administration."

These questions were argued in the original brief filed, but not under the above headings. We are rewriting the brief to correspond more closely to the suggested questions, including, however, in this brief all the points and argument contained in the original brief.

The 1922 statute replaced the 1919 statute. The same regulation is applied to the same situation.

The law here involved was initiated and passed to replace Chapter 138 of the Laws of North Dakota for 1919 declared unconstitutional by this court in *Lemke v. Farmers Grain Company of Embden* and *Lemke v. Homer Farmers Elevator Company, et al., supra.* This is shown not only by the fact that the initiated law covers the same ground as the 1919 act, but as well by the express grant to the officials created by the new law of the right to exercise the powers and perform the duties theretofore performed by the officials designated in the old law.

The instant case comes to this court on a record which discloses a situation identical with the situation involved in the two prior *Lemke* cases referred to above—both as to the interstate commerce movement of wheat and the method of purchasing such grain in that commerce. The appellees in the present case are either identical or engaged in like business with the appellees in the former case. They purchase grain from the farmers of North Dakota for shipment to the large terminal markets beyond the state and their respective elevators are operated for the purpose of facilitating this purchase and transportation. In the former case this initial purchase of grain under the circumstances existing then and now was definitely determined by this court to be an integral part of interstate commerce, the court stating:

> "The complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce."
> *Lemke v. Farmers Grain Company,* 258 U. S. at 54-55.

The general scope and purpose of the former act, as found by this court, is identical with the scope and purpose of the instant act. Referring to the former act, this court stated:

> "This act shows a comprehensive scheme to regulate the buying of grain. * * * Nor will it do to say that the

state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

Lemke v. Farmers Grain Company, 258 U. S. at pages 56-8.

The initiated law states its purpose as follows:

"An act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouses handling such farm products; and making an appropriation therefor."

While this declared purpose applies generally to farm products, the act itself, like its predecessor, relates to grain. In the initiated law, like its predecessor, the regulation is of the marketing of grain. The marketing does not precede, but is an integral part of the interstate commerce.

The claimed evils, against which relief is sought by giving the State of North Dakota, through its officials, authority over the marketing of grain in North Dakota, existed prior to the enactment of each law and formed the basis and the reason for each law alike. Referring to these claimed evils, this court stated:

"It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

Lemke v. Farmers Grain Company of Embden, 258 U. S. 60-61.

Instead of acting in harmony with the suggestion of this

court above made, the one time North Dakota State Inspector of Grades, now a United States Senator of that state, on the 16th day of March, 1922—nineteen days after the filing of the decision by this court—introduced into the Senate a bill for an act in effect attempting to modify the Constitution of the United States, as construed by this court, so that no article should be deemed to be in interstate commerce or subject to federal control or jurisdiction until the same shall have been loaded for shipment and a bill of lading issued providing for its transportation beyond the borders of the state, and until such time such product shall remain subject to the laws of the State. (Senate file 3290.) This was followed by bills introduced by a Representative of the State of North Dakota likewise providing that prior to the delivery of grain to a carrier for transportation beyond the State, such grain shall be subject to the operation and effect of the laws of the State (H. R. file 735), and another bill changing the application of the United States Grain Standards Act by providing that it shall not apply at any time prior to the delivery of grain for transportation in interstate commerce. To complete this state control program, someone framed and submitted to the electors of the State of North Dakota the present act, embodying the plan and purpose of the State through state officials to control the grading and marketing of North Dakota grain.

The appeal to Congress for relief, like the appeal to the electors of the state, was not for regulation of interstate commerce by Congress, but for abandonment by Congress of the field committed to it by the Federal Constitution and for the delegation to the State of a power essential to the Federal regulation of interstate commerce. This attitude of the North Dakota Federal delegation and of the electors of the State clearly harks back to the ante-constitution situation of the states, when each state, whether wisely or not, claimed and frequently exercised the right to control the manner and terms upon which its products should leave the state or the products of other states

should be brought into the state.

We do not deem it necessary, in arguing the instant case, to extensively review the facts involved in the former decision of this court or to refer to the many decisions of this court in which the broad control of the Federal government over interstate commerce is announced or to the decisions of this court in which the authority of the state to directly regulate, hamper or interfere with interstate commerce is denied. The verbal changes in the new act are not important. The application of this vital rule and broad principle is not dependent upon the particular terms in which regulation is expressed. Not the manner, but the fact, of interference with interstate commerce by the State is of moment. If the direct interference actually results, the particular method through which such interference occurs becomes unimportant. If the decision of this court in *Lemke v. Farmers Grain Company of Embden* referred to above is *freely and fuly accepted* as establishing the invalidity of the former act, we think it will clearly appear that its governing rule must establish the invalidity of the intiated statute.

For convenience in comparing the terms of the two Acts, we have printed below the full text of the 1922 Act and the important portions of the 1919 Act in such manner as to indicate readily a comparison of the specific provisions of each Act bearing on any particular point, and have printed in bold type those portions of the two Acts which have a direct bearing on the questions here involved.

(1922 Act.)

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922.

An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors, and warehouses handling such farm products; and making an appropriation therefor.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

Section I. **For the purpose of encouraging, promoting and safeguarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in the marketing of all kinds of grain, seed and other agricultural products,** we, the people of the state of North Dakota do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The Board of Railroad Commissioners of the state, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weighing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3,600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filed in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The State Supervisor of Grades, Weights and Measures shall maintain his office and principal place of business at the Agricultural College of this

(1919 Act.)

THE NORTH DAKOTA GRAIN GRADING ACT OF 1919.

(Extracts.)

Sec. 1. The Governor of the State of North Dakota, on or befor the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the State Inspector of Grades, Weights and Measures, who shall receive, with the approval of the State Board of Regents, the sum of One Thousand Dollars per annum.

(1922 Act.)

state, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College (and especially of the State Experiment Mill at said College), to assist and co-operate with the State Supervisor of Grades, Weights and Measures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the State Supervisor of Grades, Weights and Measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the Secretary of Agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this state. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Section V. That whenever grades, weights and measures

(1919 Act.)

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punsh for contempt.

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

Sec. 23. The State Inspector of Grades, Weights and Measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products.

Sec. 3. It shall be the duty of the Inspector of Grades, Weights and Measures to proceed at once to define and establish uniform

(1922 Act.)

shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the State Supervisor of Grades, Weights and Measures, or by the Secretary of Agriculture of the United States, then no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act; provided, that any person may buy any such products by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. The State Supervisor of Grades, Weights and Measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products, provided that such buyer, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the State

(1919 Act.)

grades and weights for grain, seeds or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Sec. 14. It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a Deputy Inspector of Grades, Weights and Measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products without first procuring a Deputy Inspector of Grades, Weights and Measures' license, provided, however, that this section shall not prohibit State Deputy Inspectors from inspecting, weighing and grading grain, seeds and other agricultural products under the direction and supervision of the State Inspector of Grades, Weights and Measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. Any person may without a license buy any grain, seeds or other agricultural products that have been graded, inspected and weighed by a Deputy Inspector of Grades, Weights and Measures, or State Deputy Inspector of Grades, Weights and Measures.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

Sec. 11. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products or the buyer or agent of a privately

(1922 Act.)

Supervisor of Grades, Weights and Measures. The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded according to the provisions of this act and the rules and regulations made hereunder.

Section VII. The State Supervisor of Grades, Weights and Measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage without compensation, or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act. Upon such suspension or revocation, if the licensee is not satisfied with the decision of the State Supervisor of Grades, Weights and Measures, he may appeal to the District Court of his county and have such order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the Secretary of Agriculture buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. A state warehouse license must be obtained through the State Supervisor of Grades, Weights and Measures for

(1919 Act.)

or publicly owned warehouse, elevator or flour mill, provided, that such buyer or agent shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. The condition of such license shall require such Deputy Inspectors of Grades, Weights and Measures to fix grades and dockage of grain and seeds inspected at their respective places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in soliciting or procuring consignments of grain, seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the State Inspector of Grades, Weights and Measures. The State Inspector of Grades, Weights and Measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder. All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the State Inspector of Grades, Weights and Measures.

Sec. 12. The State Inspector of Grades, Weights and Measures shall collect a fee of $10.00 for each license issued under the pro-

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each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the State Supervisor of Grades, Weights and Measures, and shall not exceed $1.00 for each 1,000 bushels capacity of such warehause. The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

Section IX. It shall be the duty of the Supervisor of Grades, Weights and Measures to inspect public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the state, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this state in relation thereto.

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visions of Section Eleven of this Act.

Sec. 26. A state warehouse license must be obtained through the State Inspector of Grades, Weights and Measures for each and every public grain warehouse in operation in this state. No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. The license fee is hereby fixed at Eight Dollars for warehouses of a capacity of 12,000 bushels or less and Ten Dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and Twelve Dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and Twenty Dollars for all warehouses over 50,000 bushles and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the State Inspector of Grades, Weights and Measures shall collect from the person applying therefor the license fee required herein.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this state in regard to the same, provided, that all such rules shall be published by the State Inspector of Grades, Weights and Measures in such manner as to give the greatest publicity thereof;

Sec. 22. The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, and who does not pay cash in advance for the grain so bought shall file with the State Inspector of Grades, Weights and Measures a bond, to the state with good and sufficient sureties, to be approved by the

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Section X. And it shall be the duty of every public warehouseman in this state to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the Supervisor of Grades, Weights and Measures upon written request.

Section XI. In case of any dispute as to grades, weights or measures between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product, and shall be sent to the Supervisor of Grades, Weights and Measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the Supervisor of Grades, Weights and Measures or who does not hold a license to grade, weigh or measure grain,

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Inspector of Grades, Weights and Measures in the penal sum of not less than Five Thousand Dollars nor more than Seventy-five Thousand Dollars, in the discretion of the State Inspector of Grades, Weights and Measures conditioned for the faithful performance of their duties as Public Warehousemen and the compliance with all the laws of this state in relation thereto. Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation and shall be in an amount sufficinet to protect the holders of the outstanding grain tickets.

Sec. 20. It shall be the duty of all Deputy Inspectors of Grades, Weights and Measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades reecived at terminal markets or within the state. This information shall be furnished the State Inspector of Grades, Weights and Measures upon written demand thereof.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(e) To hear and determine appeals from the decision of State Deputy Inspectors and from Deputy Inspectors of Grades, Weights and Measures;

Sec. 19. The State Inspector of Grades, Weights and Measures shall receive, hear and determine all appeals from the decision of all State Deputy Inspectors and from all Deputy Inspectors. All such appeals shall be heard and determined by the State Inspector of Grades, Weights and Measures under such rules and regulations as he may establish therefor and he shall consider the flour and bread producing qualities of such

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seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons, corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the Supervisor of Grades, Weights and Measures, provided, however, that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. To accomplish the purpose of this act the State Supervisor of Grades, Weights and Measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary, and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the Department of Grain Grading, shall remain within the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the Supervisor of Grades, Weights and Measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act. And it shall be the duty of the Attorney General of the state and his assistants and all of the state's attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the State Supervisor of Grades, Weights and Measures.

Section XIV. The salary of the Supervisor of Grades, Weights and Measures shall be paid out of the

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grain where such final decision is necessary. It shall be the duty of Deputy Inspectors of Grades, Weights and Measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

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grain grading fund, and he shall give bond to the state in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota Grain Grading Department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Section XVI. There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the State Treasury the sum of ten thousand dollars, together with all moneys in the State Treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act shall be turned into the State Treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. All of the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

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Sec. 30. Any person who forcibly assaults, resists, impedes or interferes with the State Inspector of Grades, Weights and Measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen days or more than thirty days, or both such fine and imprisonment.

Sec. 31. All money in the State Treasury known as the State Grading and Weighing Fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State Inspector of Grades, Weights and Measures. All fees and licenses collected by the State Inspector of Grades, Weights and Measures shall be turned into the State Public Grain Grading and Weighing Fund, and the salaries and compensation of the State Inspector of Grades, Weights and Measures, Chief Deputy Inspector of Grades, Weights and Measures, Chief Elevator Accountant and all other Deputies, Inspectors, Accountants, Experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

DEFINITION.—In the record, the terms "primary market" and "terminal market" are used in referring to the markets where grain is received by rail from many localities. In this brief, we refer to these markets as "terminal markets" and the elevators there located as "terminal elevators." The market to which the farmer hauls his grain is referred to in the record indiscriminately as the "local market," "farmers' market" and "country market." In this brief, we refer to this market as the "country market" and the elevators there located as "country elevators."

POINTS AND AUTHORITIES.

POINTS RELIED UPON.

We invite attention to the following propositions upon which we rely in contending that the initiated law of North Dakota, regulating the marketing and grading of grain, is invalid.

I.

The North Dakota statute of 1922 is a violation of the Commerce Clause of the Federal Constitution, in that it imposes a direct and unreasonable burden upon and interferes with the purchasing of North Dakota grain in interstate commerce.

1. The North Dakota statute of 1922 does not differ materially in its provisions and operation from the statute of 1919, held invalid by this court.

2. Section XVII of the statute of 1922 expressly adopts and must be held to authorize the doing of the very acts which were determined by this court to be obnoxious to the Federal Constitution.

II.

The statute of 1922 conflicts with the United States Grain Standards Act.

III.

The 1922 statute is in conflict with the Fourteenth Amendment of the Federal Constitution, in that it interferes with the right of individuals to make contracts and provides for the taking of property without due process of law.

I.

THE NORTH DAKOTA STATUTE OF 1922 IS A VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, IN THAT IT IMPOSES A DIRECT AND UNREASONABLE BURDEN UPON AND INTERFERES WITH THE PURCHASING OF NORTH DAKOTA GRAIN IN INTERSTATE COMMERCE.

COMMERCE IN NORTH DAKOTA GRAIN IS LARGELY INTERSTATE. —North Dakota produces more spring wheat than any other state in the Union. Its crop varies from one hundred million bushels to one hundred fifty-six million bushels annually. This great quantity of wheat when marketed moves largely to other states. Approximately ninety per cent of the wheat raised and sold in North Dakota is bought for shipment to and is actually shipped to the terminal markets outside of the State, principally to the Minnesota terminals at Minneapolis and Duluth. Only ten per cent is sold for use within the State of North Dakota. It thus appears that consumers throughout the United States are largely dependent upon the wheat grown in North Dakota for their supply of flour and other wheat products, and conversely the producers of wheat in North Dakota are largely dependent upon the demand in other states for a market for their grain.

This general situation has existed for many years and facilities have been developed in recognition of its existence and its permanency. Country elevators have been built connected with railroad tracks at all stations within the grain growing area throughout North Dakota by men and companies engaged in

handling this grain. Approximately twenty-two hundred such elevators are operated within the State of North Dakota. These elevators are of limited capacity and are used largely to facilitate the transferring of grain from the farmers' wagons, in which it is hauled to the local market, to railroad cars for shipment to the terminal markets beyond the State as rapidly as carload lots of one grade of grain are accumulated and cars for loading can be obtained. At the terminal markets terminal elevators of great capacity have necessarily been gradually built up to receive and hold this grain until it is milled or exported. The aggregate elevator capacity in Minneapolis is fifty-six million one hundred fifty thousand bushels, and at Duluth, thirty-six million three hundred twenty-five thousand bushels, making a total elevator capacity at the Minnesota terminals of ninety-two million four hundred seventy-five thousand bushels. Thus not only does this vast interstate commerce exist, but, in order to provide facilities for it, enormous permanent investments have been made and thousands of persons are actively engaged in carrying it on.

THE PRICE PAID FOR WHEAT IN NORTH DAKOTA IS BASED ON THE MINNESOTA TERMINAL MARKET PRICE.—This fact is known to sellers and cards showing such price basis are generally posted in North Dakota country elevators. The "Margin" referred to in the North Dakota Statute is the difference between the Minnesota terminal market price and the price paid at the country elevator in North Dakota less freight to the terminal market.

STANDARDS FOR GRADING GRAIN IN NORTH DAKOTA PRIOR TO THE ESTABLISHMENT OF THE FEDERAL AND NORTH DAKOTA STANDARDS.—Long prior to 1916 Minnesota had provided for the establishing of standard grades for grain known as "Minnesota Grades." The State Board of Grain Appeals annually, at the beginning of the crop movement season, established and published such grades to apply during the ensuing season. A Grain Inspection Department was created with a force of In-

spectors charged with the duty of grading grain. It had as well a State Grain Weighing Department. In the exercise of its police power over public elevators it required that all grain received in such elevators for storage be inspected and graded by a State Inspector and reinspected when it was delivered out of the elevators. Section 4442, General Laws of Minnesota, 1913, provides:

> "Inspection. All grain received at a terminal warehouse shall be inspected and graded by a State Inspector, and reinspected in like manner upon delivery from such warehouse. The charges for such inspection shall be paid by the warehouseman and added to the storage, and the Chief Inspector may recover such charges from the warehouseman"

This Minnesota Statute is similar to the Missouri Statute involved in *Merchants' Exchange v. Missouri,* 248 U. S. 365. Like Statutes exist in practically all the grain producing states and no longer is there any doubt as to their validity. The storage and handling of grain for others is a business affected with a public use and its regulation is within the police power of a state. Such Statutes are designed to protect the public from fraud and imposition.

Because the bulk of the North Dakota wheat moved to Minnesota and was sold at the Minneapolis and Duluth terminal markets according to Minnesota grades, naturally buyers of grain for the Minnesota terminals bought it in North Dakota according to these grades. This was the general practice although some buyers used "card grades" containing certain grades of wheat which were not official "Minnesota Grades." Of course, grain so bought was not actually inspected in North Dakota by a Minnesota Inspector, but the buyer and seller would agree that a quantity of wheat brought to a North Dakota elevator for sale was No. 1 or No. 2, or some other defined Minnesota grade, and would then agree to buy and sell at the price which was the going price for that grade of wheat.

BUT THE MINNESOTA STATUTE DID NOT APPLY TO THE BUSI-

NESS OF BUYING GRAIN AND DID NOT REQUIRE THAT ALL GRAIN BOUGHT AND SOLD IN THE STATE SHOULD BE FIRST GRADED OR THAT GRAIN MUST BE BOUGHT OR SOLD ACCORDING TO "MINNESOTA GRADES."—The State established and defined the grades and it furnished the facilities for making a State inspection at a prescribed fee. Naturally in order to make trading in grain exact and definite at the Minnesota terminals, grain buyers as well as elevator owners bought and sold grain as of a certain Minnesota grade, according to State inspection. Under such sales, if, on appeal, the grade was changed, a corresponding price adjustment could be made. In contracts for future delivery of grain, the Minnesota grade was adopted as affording an accurate and dependable description of the kind of grain to be delivered under the contract and the Minnesota inspection was adopted as final evidence of the grade. These grades and this inspection were not only recognized at Minnesota terminals, but generally in other terminal markets as well as in the country markets. *This general acceptance of Minnesota grades, however, was not under attempted compulsion of the Minnesota Statute.* The only Statute attempting to compel acceptance of local State grades to which our attention has been directed, other than the North Dakota Statutes, is a Wisconsin Statute, Chapter 19, Laws of Wisconsin 1905, as amended Chapter 12, p. 19, Sp. Sess. Laws 1905. This law was held invalid as an interference with interstate commerce in *Globe Elevator Co. v. Andrew,* 144 Fed. 871, affirmed 156 Fed. 664. The applicability of this decision to the North Dakota Statute, as well as the inapplicability of the decision on the Missouri Warehouse Statute will be discussed later.

STATUTES COMPELLING GRADING OF GRAIN BY LICENSED INSPECTORS AS A CONDITION OF ITS PURCHASE.

In 1913 Congress enacted the United States Grain Standards Act, being Part B of the Agriculture Appropriation Act of Au-

gust 11, 1916, Chapter 313. This Act authorized the Secretary of Agriculture to establish grain standards or grades. Pursuant to this authority, Service and Regulatory Announcement Number 33, promulgated April 13th, 1918, effective July 15th, 1918, established official grain standards for wheat and shelled corn and Announcement Number 46, promulgated March 15th, 1919, effective June 16th, 1919, established official grain standards for oats.

After the passage of the Federal act, the 1917 session of the North Dakota Legislature passed a grain grading and inspection statute. This statute was replaced by the 1919 statute held invalid in the Lemke cases above. The 1922 statute was then initiated and passed. These North Dakota statutes, like the United States Grain Standards Act, compel the grading of grain as a condition of its purchase.

THE FEDERAL ACT IS VALID AND PROPER LEGISLATION.

(a) It regulates and burdens interstate commerce, but this is within the authority of Congress.

(b) It established a uniform method of grading grain moving in interstate commerce, by adopting existing State Inspection Departments and making State inspectors Federal inspectors.

THE NORTH DAKOTA STATUTE IS NEITHER VALID NOR PROPER LEGISLATION.

(a) By making State grading a condition to buying grain in interstate commerce, it attempts a direct regulation and places a direct burden on interstate commerce. This is beyond the authority of the State.

(b) It destroys uniformity in grading grain by making grain buyers State inspectors. Under the Federal statute grain buyers cannot be federal inspectors.

THE NORTH DAKOTA STATUTE REQUIRES THE GRADING OF ALL GRAIN BOUGHT OR SHIPPED WITHIN THE STATE SUBJECT TO STATE SUPERVISION. THE BULK OF THIS GRAIN MOVES IN INTERSTATE COMMERCE. THE GRADING OF GRAIN MOVING IN INTERSTATE COMMERCE REQUIRES A UNIFORM RULE.

In *Globe Elevator Company v. Andrew,* 144 Fed. 871, a Wisconsin Statute requiring all grain sold at Superior, Wisconsin, to be sold according to Wisconsin grades was held invalid.

Superior, Wisconsin, an important lake port receiving large quantities of grain from railroads and shipping it out by boat, became dissatisfied with the customary buying and selling of grain on Minnesota weights and grades and desired the establishment and recognition of Wisconsin weights and grades. Reflecting this attitude of its important grain terminal, the Wisconsin Legislature created a Wisconsin Grain Weighing and Grading Department in 1905 (Laws of Wisconsin 1905, B-37, C-19, as amended by Laws Special Session 1905, B-19, C-12). This Statute *required grain bought and sold in Superior to be* weighed and inspected under the Wisconsin Statute *and prohibited any person from offering for sale or selling or delivering any grain in Superior under the Minnesota grading or under any other grading not provided in the Wisconsin Act.* The decision by the Circuit Court states:

> "The attempt of the Wisconsin statute to prescribe the standard of sale thus appears to be a regulation of commerce. It interferes with and attempts to destroy the grades on which the purchaser depends in making his purchase and succeeding sale.
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> It is also clear to me that so important a matter as fixing the grades by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress. Certainly it cannot readily be bought and sold according to two systems of inspection. It cannot be bought by one and sold by another. Conflict-

ing state systems would only obstruct. *State Freight Tax*, 15 Wall. 243, 27 L. Ed. 146; *Welton v. Missouri*, 91 U. S. 280, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 273, 23 L. Ed. 543. Like the regulation of tolls on an interstate bridge, the fixing of a standard of sale for grain, moving in interstate commerce admits of only one uniform system."

This decision which was affirmed by the Circuit Court of Appeals in 156 Fed. 664, contains an exhaustive discussion of interstate commerce in grain and a comprehensive review of the decisions relating to the police power of the State and the exclusive power of Congress to regulate acts constituting interstate commerce. The discussion and decision in the main are directly applicable to the North Dakota Statute and the questions here involved and the reasoning was adopted as directly applicable to the North Dakota Act of 1919 by the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

Grain moves in interstate commerce through many states. It retains substantially a uniform character and condition throughout the movement. It may be bought and re-sold several times before it reaches its final destination. It seems clear, therefore, that the grading of grain is a subject lending itself to and requiring one uniform regulation. Recognizing this situation, Congress in 1916 passed the United States Grain Standards Act which requires all grain sold or shipped in interstate commerce to be inspected by licensed Federal Inspectors and to be by them graded according to duly established Federal standards.

At the time the Globe Elevator case, *supra*, was decided, the Federal Grain Standards Act had not been passed and yet Judge Sanborn in that case, held that the attempt of the Wisconsin Statute to *compel* purchases in Wisconsin to be made according to Wisconsin inspectors' grades was an interference with and a burden upon the usual established course of interstate commerce.

Some plausible reason can always be assigned for a local

interference with interstate commerce, but if the evil in fact exists, it does not call for the exercise of a State regulation but for a Federal regulation. It is a matter requiring a uniform regulation. In matters within the exclusive jurisdiction of Congress it is for Congress to determine when and how the matter should be regulated. The absence of a regulation by Congress is a Federal determination that that regulation is not required. So it was said by Mr. Justice Field in *County of Mobile v. Kimball,* 102 U. S. 691, 697:

> "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. *Some of them are national in their character, and admit and require uniformity of regulation,* affecting alike all the states; others are local, or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may* be mentioned all that portion of commerce with foreign countries or between the states which consists in the *transportation, purchase, sale and exchange of commodities.* Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

Much of the brief and argument in support of the state grain grading acts is devoted to claimed unfair practices surrounding the purchase of grain from producers in North Dakota. A short answer to this argument is that if such abuses exist, they exist in interstate commerce and should be remedied by Congress. This court clearly announced this as the proper remedy in *Lemke v. Farmers Grain Company of Embden,* 258 U. S. at

60-61. We do not desire to divert attention from the actual point involved in this case by engaging in a controversy about the conditions under which grain is marketed in North Dakota. However, the existence of more than two thousand country elevators, many of them farmers co-operative elevators—these latter making no profit from the purchase of grain from the farmers and marketing it at the terminal markets—and the resulting competition necessarily relieves the marketing of grain from those abuses which are apt to arise in business transactions where one side or the other has a monopoly.

The actual conditions surrounding the marketing of grain have repeatedly been announced by independent commissions and public officials, and the reports thus made present a very different picture from that given in the appellants' brief. The answer in this case (Record, p. 37, with diagrams upon the three preceding pages) shows the results of an investigation made by the Department of Agriculture in co-operation with the Federal Trade Commission of the actual grades given the 1917 grain crop in the states of Minnesota, North Dakota, South Dakota and Montana. From an inspection of this diagram it will appear that in each of these states, on the average grain purchased at country elevators was assigned a higher grade than was given the same grain at the terminal market. This evidences the fact well understood in the grain trade, that the sharp competition between elevator buyers at country points expresses itself in the giving of higher grades to grain than that grain is actually entitled to receive. The price paid for grain of a certain grade at a country marketing point is based on the price at that time of that grade of grain at the terminal market, and the price paid for that grade of grain by farmers' co-operative elevators, independent elevators and line elevators is necessarily uniform and is shown on cards posted generally in the elevators, but manifestly the grade to be given to a particular lot of grain depends upon the judgment or desire to buy of each buyer. This results in higher grades being

given by the buyers than the same grain will receive upon Federal inspection at the terminal points. This higher grade, of course, results in a correspondingly higher price to the farmer.

The same situation was disclosed by an investigation made by the Federal Trade Commission immediately prior to September 15, 1920, and is stated in the Report of the Federal Trade Commission on the Grain Trade, Vol. 1, dated September 15, 1920. At page 202 it is stated:

> "As shown by the table, however, the grand total loss on grading, weighing and docking combined amounted to $83,337.22, or a loss of 0.35 of a cent per bushel."

As shown by the context, the term "loss" is applied to the loss in grade, dockage and weight of the grain dealer buying grain at country points and selling it at the terminal markets under State or Federal inspection.

The situation as disclosed by these reports leaves as the only ground of complaint of the farmer the claim that the North Dakota grain crop is sold at an inadequate price, and this is a widespread belief among farmers. The recent co-operative pooling movements represent an attempt, whether wise or unwise, to remedy that situation by placing the farmer in a position to "name his own price for his commodity." The legislation under consideration of the State of North Dakota represents, so far as we are informed, the only effort of the State as a political unit to bring about, wholly or partially, this price control by regulating and establishing the conditions under which the grain crop of the State shall move out of the State in interstate commerce.

It is continually suggested by the State that if, in fact, there is at present no imposition on the farmers in the purchasing of grain, it follows that no hardship can result to buyers of grain from the enforcement of the North Dakota statute. This suggestion, of course, does not meet the point that the State has not the right to directly interfere with interstate commerce. But it was the arbitrary enforcement of the statute of 1919 and

the rules and regulations thereunder, as well as the imposition of burdens by the State, that gave cause for continual complaint on the part of grain buyers. They believed that the law was passed and enforced as a partisan political measure; that under it continual discrimination was practiced; and they likewise believed that the 1922 Act was initiated and passed as a partisan political propaganda, and that the grain supervisor thereunder would arbitrarily enforce the powers conferred upon him by the statute unfairly to the grain buyers. Under the terms of the Act the Supervisor may at any time require grain to be graded above its true grade. He may at any times require payment for dockage according to his idea of its value, although the buyer and seller, when the grain was delivered and the purchase price paid, had agreed on its true value. Margins called reasonable by the Supervisor may be so small as to entail a loss in buying grain. He continually controls the buyer by the threat of the revocation of his inspection license whenever in a dispute the Supervisor takes the side of the elector farmer seller. In addition, the imposition of excessive license fees, and the requirement of bonds, all burden the persons seeking to buy grain in interstate commerce. This statute is designed to and will, if put in operation, prevent the free purchase of North Dakota grain and obstruct its free movement in interstate commerce.

THE DECLARED PURPOSE OF THE NORTH DAKOTA STATUTE.—The 1922 statute, regardless of the long established movement of grain in interstate commerce and alike of the decision of this court upon the former statute, authorizes the State officials of North Dakota to investigate and supervise the marketing of this grain. The statute in its recital boldly declares "the purpose of the State of North Dakota to supervise and regulate the marketing of farm products," defines the scope and manner of such supervision and the powers and duties of the persons charged with same; provides for licensing buyers as inspectors. This purpose is carried out by placing the whole machinery for

marketing the grain crop of North Dakota under the supervision and control of State officials.

BUYERS MUST BE LICENSED AS INSPECTORS.—This necessarily results from the provision of the statute (Section V), that no person shall buy grain unless it shall have been inspected and graded by an inspector licensed under the provisions of the Act or under the provisions of the United States Grain Standards Act. No Federal inspectors are at country elevators for the reason that the buyers cannot be made Federal inspectors, and no provision is made by the State for disinterested inspectors who could obtain Federal licenses. So the practical effect is that all grain must be graded under the provisions of the State Act and under the direction of the State Supervisor by buyers licensed as inspectors. This is recognized by the provision in Section VI requiring the State Supervisor of Grades, Weights and Measures to issue a license to grade to any person engaged in buying grain. The practical situation is also clearly recognized in the preamble to the Act referred to above "providing for *licensing buyers,* solicitors and warehouses *handling such farm products.*" The permission in Section V to buy grain by sample has no practical significance. Grain is not bought by sample at country points. There can be no question that the result of this statute is to require that at all the twenty-two hundred elevators in North Dakota in order to buy grain the buyers must receive from the State Supervisor a license to grade grain and also a license for the operation of the elevator.

LICENSE FEES.—The 1922 Act does not require in terms a fee for a license as an inspector, but as the buyer licensed as an inspector is the elevator operator, it accomplishes the result by placing an excessive fee for a license for the operation of the elevator and providing that these license fees shall go into a fund from which shall be paid the expense of the State grain inspection and grading. Thus it clearly appears that the elevator license fee is not for the purpose of inspection of warehouses, but it includes an amount of money for the supervision

of grading, and this in its final analysis is a payment for the privilege of buying grain in interstate commerce. In construing the law, its practical operation must be considered, and, considering it in this manner, the license provisions are a clear and direct burden on interstate commerce.

It has repeatedly been held that a state cannot require a license as a condition to engaging in interstate commerce.

Robbins v. Shelby Taxing District, 120 U. S. 489.

Brennan v. Titusville, 153 U. S. 289.

Lemke v. Farmers Elevator Co., 258 U. S. 50.

REVOCATION OF LICENSES.—The State Supervisor may revoke the license of an inspector. Thereby he necessarily withdraws from the buyer the right to buy grain, because as a practical matter the buyer cannot buy grain until it is graded, and there is no other existing method for the grading of the grain except through the license held by the buyer. Such a revocation, in effect, not only prevents the buyer from buying grain, but it closes the elevator devoted to the business of handling purchased grain. It is true some grain is stored in elevators, but practically all such storage is temporary and the grain is ultimately purchased by the buyer. By special contract the wheat growers pool uses certain elevators for the storage of its grain and the transfer of the same to cars for shipment to the terminal market. This special arrangement, however, does not affect the general course of business at the great majority of the elevators. (Section VII of statute.)

MARGINS.—The State Supervisor, among other things, is required to exercise his power to prevent unreasonable margins of profit. (Section IV of statute.) The "margin" is the spread between the price paid at the country elevator and the price at the terminal market. The margin thus fixes the price at which the grain is bought at the country elevator. The Supervisor can, through his control of licenses essential to the buying of grain, dictate the margin and the resulting price to be paid by the buyer for wheat.

DOCKAGE.—This controlled buyer is not permitted to *retain* dockage without a payment therefor satisfactory to the Supervisor. Section IV of the statute provides:

> "The value of dockage shall be considered and the buyer shall not be permitted to *retain* same without just compensation. He shall pay the fair market value for same or *separate it and return it* to the producer."

This provision, as the identical provision was construed in the former statute by the State Supervisor, means that at any time after grain has been bought and received and paid for at a price agreed upon between buyer and seller, the State Supervisor may either with or without complaint of the seller require the buyer to pay to the seller an additional amount as specific payment for such dockage. While the buyer might resist the order, as a practical result, in order to avoid interruption of his business, he would make the payment, no matter how unreasonable it was.

The alternative provision that the buyer must return dockage to the seller is even more arbitrary and interferes to an even greater extent with the right to freely engage in interstate commerce in North Dakota grain. This seems too apparent for argument. The only conceivable means of separating the dockage from the grain is by means of expensive cleaning apparatus and machinery. In order to take advantage of this alternative, the buyer must install in his elevator this expensive apparatus. To impose this obligation on the buyer involves a direct and very substantial burden on his interstate business. Furthermore the screening of grain, particularly during the busy season, slows down the handling of grain through the elevator and interferes with its proper and advantageous use by the owner.

No analogy can be drawn between a law requiring a person buying grain in interstate commerce to screen it as a part of the very transaction of purchase and a law requiring the owner of a coal mine to screen coal before weighing the same. The entire process of mining coal is subject to the police power of the

state in which it is carried on. It is subject to regulation under this power even though it be a direct and burdensome interference with the operation. It has never been questioned but that the state can regulate the mining of coal within its borders. It can not, however, directly regulate or burden any transaction which is a part of interstate commerce in grain, even though that transaction takes place within its borders.

GRADING OF GRAIN AS PROVIDED FOR IN THE 1922 STATUTE IS AN INTEGRAL PART OF THE PURCHASE OF THAT GRAIN AND HENCE AN INTEGRAL PART OF INTERSTATE COMMERCE.

That the purchase of grain for movement beyond the state in the manner in which it is purchased by the appellees in this case is an integral part of the interstate commerce in that grain is no longer open to question.

Lemke v. Farmers Elevator Company of Embden, 258 U. S. 50.

Stafford v. Wallace, 258 U. S. 495 at 519.

Pennsylvania v. West Virginia, 262 U. S. 553 at 597.

United Leather W. I. U. v. Herkert & Meisel Trunk Co., 284 Fed. 446, 450 (C. C. A., 8th Circuit, Opinion Judge Sanborn).

Forced to concede, by these decisions, that the purchase of grain in North Dakota is a part of interstate commerce and cannot be directly controlled by the State of North Dakota, counsel for the State now strenuously contend that the grading, which is alleged to precede the purchase, is not a part of the complete interstate commerce transaction, and in support of this claim use the identical arguments advanced in the former case to support the claim then made that the purchase of grain preceded the interstate commerce transaction, and counsel very naturally drift from the argument that grading is not a part of the interstate commerce movement to a repetition of their original argument that the sale, preceding, as it does,

transportation, should not be held to be a part of interstate commerce. See appellants' brief, pages 42 to 48. The manifest difficulty with the State's position is that they are attempting to segregate different elements of the single unit of interstate commerce, when, in effect, they are so related to the completed interstate commerce transaction that they cannot be segregated.

In other portions of the brief, and in the answer of the State, the inclusion of grading in the purchase is shown (Record, p. 25). The State's answer contains this allegation:

> "That the *price* of said grain either for storage or sale *is wholly fixed by such grade* and inspection, and any and all returns or remuneration which the said farmer producer may receive for his sole product *depends necessarily upon the grade and inspection given to such grain by such buyer.*"

Under the existing conditions of buying grain in North Dakota, as well as under the provisions of the 1922 Act, the grading is an incident in and a part of the purchase. The grade assigned the grain determines the price. The buyer offers to give the grain a certain grade and thereby offers the local price for that grade of grain. If no agreement is arrived at as to grade and resulting price, then the offered grade is rejected by the seller, just as well as the price. If one buyer who offers a grade and price for a farmer's grain does not succeed in purchasing it, the grain is taken to another buyer who names the grade he will allow on the grain. The grain is not given a grade until a purchase is made. The acceptance by the seller of the buyer's offer alike complete the purchase and the establishment of the grade.

This is not only the actual method of buying grain, but it is the method recognized by the North Dakota Grain Grading Acts. The buyers are licensed as inspectors so that they may grade as a part of their purchase. The buyers are not authorized to establish grades independently of a purchase or of receiving the grain for storage.

Manifestly the grading of grain under the statute of North Dakota has no relationship whatever to grading grain under Federal inspection. Federal inspectors cannot, under the Federal statute, participate in any way in the purchase of the grain. The inspection and the buying are made wholly separate transactions under the Federal statute. Under the North Dakota statute and the North Dakota practice, they are a single transaction.

The fact that some grain is graded and stored and not immediately sold does not affect the question here involved. The 1922 act throughout places its limitation on the buying of grain. If the limitation is invalid as applied to buying, it does not help the statute or affect the question of invalidity to say that the statute would not be invalid if it related solely to the storage of grain, just as the statute would not be invalid if it related solely to grain that did not move in interstate commerce.

THUS THE STATE CARRIES OUT ITS DECLARED PURPOSE TO SUPERVISE AND REGULATE THE MARKETING OF ITS WHEAT CROP —TO SUPERVISE AND REGULATE INTERSTATE COMMERCE.—It is an effective, practical State regulation and control under existing conditions of buying grain in interstate commerce in North Dakota, and it prevents the persons seeking to buy that grain from freely engaging in interstate commerce and places a direct burden and restriction upon that commerce.

Before the adoption of the Federal Constitution, each state regulated all trading in commodities that might be found within its borders. The result is a matter of history. There was no authority which had the power to regulate entire transactions in which more than one state was involved. To supply this authority, the Interstate Commerce Clause was placed in the Federal Constitution. If North Dakota can supervise and regulate, through a systematized control of the marketing machinery, the sale of its chief product in interstate commerce, Minnesota and Michigan may do the same as to their iron,

Pennsylvania and West Virginia as to their coal, the southern states as to their cotton. The free flow of interstate commerce would thereby be interfered with and in fact wholly destroyed.

THE EXISTENCE OF A STATE POWER TO REGULATE PUBLIC WAREHOUSES DOES NOT IN ANY DEGREE TEND TO ESTABLISH A STATE POWER TO DIRECTLY REGULATE AND CONTROL THE MARKETING OF GRAIN IN INTERSTATE COMMERCE.

The State cannot under any guise impose a *direct* burden on or *control* interstate commerce or *fetter by conditions the right of individuals or corporations to carry on such commerce within the state.*

But beyond this, until Congress acts, the state may exercise within its borders its inherent power *although interstate commerce may thereby be indirectly affected.* These principles were applied and their applications distinguished in the two leading cases of

Munn v. Illinois, 94 U. S. 113.

Wabash, etc., Railway Company v. Illinois, 118 U. S. 557.

In the Munn case it was established:

Grain warehouses are devoted to a public use and are therefore subject to public control. They may be incidentally connected with interstate commerce but not necessarily so. They lend themselves properly to local regulation. Until Congress acts, the state in which a warehouse is located may exercise its governmental powers over it even though it thereby indirectly affects interstate commerce.

In the Wabash case the court definitely determined:

That the state power of regulations referred to in the Munn case did not extend to acts constituting an integral part of interstate commerce itself, or to those subjects related to interstate commerce requiring uniform regulation. The court refused to sustain under the rule of the Munn case a state regulation which affected charges for interstate transportation.

In the Wabash case this rule laid down in *Hall v. De Cuir*, 95 U. S. 485, is quoted and approved of:

> "But we think it may safely be said that state regulation which seeks to impose a direct burden on interstate commerce or interfere directly with its freedom does encroach on the exclusive power of Congress."

The distinction thus drawn has never been questioned or modified by the Federal courts. Following *Munn v. Illinois*, different state regulations of public warehouses were sustained in

Budd v. New York, 143 U. S. 517.
Brass v. Stoeser, 153 U. S. 391.
Cargill v. Minnesota, 180 U. S. 452.
Merchants Exchange v. Missouri, 248 U. S. 365.

In all of these cases the question involved was the right of the state to regulate the conduct of public warehouses located within the state. In *Cargill v. Minnesota*, the state requirement of a license for a public warehouse was only sustained because:

> *"The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased.* The license has reference only to the business of the defendant at its elevator and warehouse." (Italics ours.)

Notwithstanding the clear force and effect of the decision of the Supreme Court in *Cargill v. Minnesota*, counsel for the State in their brief discuss at great length the provisions of the statute considered in that case in an effort to show that the statute there construed did, in fact, restrain the buying of grain moving in interstate commerce. We suggest that counsel cannot alter the announced force and effect of the decision of this court in the *Cargill v. Minnesota* case.

Brass v. Stoeser sustained a North Dakota statute requiring public warehouses to receive grain for storage at the rates established by the statute. *North Dakota still has this statute.*

The validity of this statute establishing a complete regulation of public warehouses is not here questioned. The statute of which we complain attempts an exercise of state power involving an entirely different subject. It regulates the *buying* of grain. It does the very thing, the absence of which is referred to in the Cargill case as sustaining the validity of the Minne- State statute regulating and controlling the marketing of grain sustainable under the rule of the Munn and Brass cases. The state statute regulating and controlling the marketing of grain is wholly independent of any warehouse regulation and is invalid within the rule of the Wabash case. The rule applicable to the North Dakota statute regulating the marketing of North Dakota grain is the rule that the State cannot under any guise impose a direct burden on or control interstate commerce or fetter by conditions the right of individuals or corporations to carry on such commerce within the State. The two rules, with the distinguishing conditions, are clearly stated in the *Minnesota Rate Cases,* 230 U. S. 352, at 398, 399, 400, as follows:

> "The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden,* 9 Wheat. 1, 196.
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> "It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.
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> "The principle, which determines this classification, underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature

should be under the control of one authority and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains."

The distinction between the two lines of cases was clearly pointed out in the Lemke cases, both in the decision in the Circuit Court of Appeals and in this court. Notwithstanding this, counsel for the State still urge that the cases upholding the warehouse statutes are authority for their position here, and they especially rely on *Merchants Exchange v. Missouri,* 248 U. S. 365. In *Lemke v. Farmers Grain Company of Embden,* 258 U. S. 50, at page 60, it is stated in reference to that case:

"The act there in question did not undertake to regulate the buying of grain in interstate commerce, nor to levy a license tax upon the privilege, nor to fix the profit which could be realized on grain bought, shipped and sold in interstate commerce."

Or as it was succinctly put by the Circuit Court of Appeals in the same case:

"The existence of a state power to regulate public warehouses does not establish a state power to directly regulate and control the marketing of grain in interstate commerce, and authorities in support of the power to regulate warehouses are not in point."

Farmers Grain Co. of Embden v. Langer, 273 Fed. —.

I-1. THE NORTH DAKOTA STATUTE OF 1922 DOES NOT DIFFER MATERIALLY IN ITS PROVISIONS AND OPERATION FROM THE STATUTE OF 1919 HELD INVALID BY THIS COURT.

At page 56, 258 U. S., this court stated of the 1919 Act in the Lemke case:

"This act shows a comprehensive scheme to regulate the buying of grain."

The preamble of the 1922 Act states:

"An Act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products."

Certainly in their general scope and purpose, the two acts are identical. Prior to the passage of the old Act, the complaint was made that grain was undergraded and underpriced. On page 12 of the appellants' brief, in discussing the 1922 Act, it is stated:

> "In view of the importance of the grain business and the vital dependence thereon by the entire state, and in view of the further fact that the returns to the great majority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the price for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the *grading* of the grain becomes at once manifest."

We concur fully in this statement. The vital thing to the farmers of North Dakota is that they obtain an adequate price for their grain, and it was to secure this adequate price that both statutes were enacted, and under both statutes this result is sought to be obtained by a regulatory power and control over the machinery under which the grain crop is bought and sold.

LICENSE TO BUYERS AS INSPECTORS. UNDER BOTH ACTS THE CONTEMPLATED AND NECESSARY RESULT IS THAT ALL BUYERS OF GRAIN WILL BE LICENSED AS INSPECTORS.

It is true that under the 1919 Act the buyers were licensed both as buyers and inspectors, but this is clearly a distinction in terms without any practical distinction or change in purpose or effect. The duty under both Acts is to inspect and grade. Again counsel for appellants are forced to practically concede this at page 10 of their brief in this case:

> "It is plain that the first of the foregoing propositions is the vital proposition, because if the person desiring to *buy* grain, be licensed to *grade* grain, no difficulty can be experienced in complying with the second provision, to-wit, that grain not officially graded, cannot be purchased by grade."

The buying and grading of grain is one transaction. The buyer grades the grain. The license to him to grade is the

equivalent of license to him to buy. There is no such thing under the statute of North Dakota as the business of grading grain. It is not a business. The business is buying grain. For the grading no fees are paid. The grading is a mere inseparable incident to the buying. Counsel for appellants undertake to point out differences between the two Acts. This clearly nominal difference is the one they first refer to (p. 11, Appellants' Brief).

A STATE LICENSE IS REQUIRED UNDER THE ACTUAL AND ONLY POSSIBLE CONDITIONS OF PURCHASING GRAIN.—While the 1922 Act provides that grain may be graded by inspectors holding either a State or Federal license, admittedly there are no Federal inspectors at country elevators. Buyers cannot be appointed Federal inspectors. This situation is also recognized by the answer interposed by the State. At page 24 of the record, Section IV, it is stated:

> "This grading and inspection is supposed to be done in accordance with grades fixed under the United States Grain Standards Act *by the buyer in charge of the elevator,* and he is the only person ordinarily available with sufficient information and knowledge of grain to properly grade and inspect the same, *and the grading and inspection of practically all grain is wholly dependent upon such buyer.*"

Under the 1922 Act, as well as under the 1919 Act, the inspection of grain will necessarily be wholly dependent upon the grain buyer. The 1922 Act *requires* the State Supervisor to name all buyers as inspectors, upon condition that they pass a satisfactory examination. This is the second claimed difference between the two Acts pointed out by counsel for appellants.

Another nominal difference between the two Acts relied upon by the state (page 11 of their brief) is that:

> "Under the old Act grain buyers were made deputy state inspectors, while under the new Act *they are simply required to hold a license.*"

Such an unfounded claim of a difference requires no discus-

sion. The interesting thing in the claim, however, is that again the State understands and concedes that *"grain buyers" are "required to hold a license."*

THE ADOPTION OF THE FEDERAL STANDARDS NOT A MATERIAL CHANGE IN THE TWO ACTS.—While under the old Act the State Inspector was authorized to establish grades, he in fact had adopted as the grades of North Dakota the Federal grades. This was the situation before any action was brought to test the validity of the statute. The course being open to the State Inspector to adopt the Federal standards, and he having done so, no invalidity of the State Act could be predicated on a possible difference in standards, and this court did not so hold or attach importance to that possibility. Therefore, the situation is not different under the two Acts. As we have discussed elsewhere, the standards are but names—designations of different classes. The actual important thing is the determination of what class shall apply to a particular sample of grain. This is where the actual supervision and control of grades arises. The inspector determines the grade of a particular sample of grain. The inspection and classification of the grain is the only matter of importance. The name merely describes the classification after it has been adopted by the inspector.

UNDER THE NEW ACT, LIKE THE OLD, THE STATE SUPERVISOR AND THE STATE RULES AND REGULATIONS CONTROL THE STATE INSPECTORS IN DETERMINING THE GRADE OF GRAIN.—Section VI the Act expressly provides that the inspector shall inspect and grade grain "according to the provisions of this Act and the rules and regulations made hereunder." Section XI provides:

> "In case of any dispute as to grades between the producer and the purchaser operating a public warehouse, a sample shall be taken and shall be *sent to the Supervisor of Grades,* and the proper grade shall be determined by him *under such rules and regulations as he may establish.*"

There is in the State law no adoption of the rules of the Fed-

eral Inspection Department. Section VI of the new Act simply provides that if Federal standards are established, those standards shall become the grades and standards of the State.

Again, counsel for the State are wholly unwarranted in making the claim, as they do in their brief at page 11, that under the new State Act the rules and regulations for grading grain established by the State are subordinate to the Federal rules and regulations.

The State Supervisor appoints the State inspectors. He may revoke their licenses. They are bound to grade grain under the rules established by the State. In case of dispute, the appeal is to the State Supervisor and he determines the grade according to the rules established by him. There is no method by which an appeal may be taken to the Secretary of Agriculture. The entire machinery for classifying grain and determining its quality is under the absolute jurisdiction and control of the State Supervisor and the buyers of grain licensed by him as inspectors cannot, under the terms of the Federal Act, be Federal inspectors.

LICENSE FEE. THERE IS NO MATERIAL DIFFERENCE BETWEEN THE TWO ACTS AS TO LICENSE FEES.—The new Act has manifestly attempted to escape the charge that a license was imposed for buying grain, criticized by the decision of this court. This feeble attempt is the only recognition in the new Act of the decision of this court in the Lemke case, and this recognition is sought by a palpable, attempted evasion of the decision, rather than by the slightest conformity in principle to it. The fact appears (Record, p. 49) and is not disputed, that the average capacity of country elevators in North Dakota is approximately 30,000 bushels. Section VIII of the 1922 Act provides for a license fee for elevators to be fixed by the State Supervisor of Grades at not to exceed One Dollar for each 1,000 bushels capacity of such warehouse. Thus the average permitted license fee is Thirty Dollars per elevator per year. This money so raised is the only annual fund provided by the Act for the

payment of the expenses of the State Grading and Inspection Department. (See Section XVI of the Act.)

Heretofore, under existing statutes of North Dakota, an average fee of Six Dollars per year for each elevator has provided ample funds for the administration of the rules and regulations covering the operation of warehouses. The difference between Six Dollars a year and Thirty Dollars a year, or Twenty-four Dollars, represents a sum raised from elevator owners for no other purpose than the maintenance of the State Inspection and Grading Department of North Dakota. As heretofore stated, the buyers operate the elevators, which are used in connection with the buying of grain and furnish the only practical facility for receiving grain purchased and forwarding it to a terminal market. It is the buyers who must pay this fee.

Under the 1919 Act, a Ten Dollar annual license fee was paid by licensed buyers of grain, which annual license fee was turned in to the State Public Grain Grading and Weighing Fund, the same fund into which the warehouse license fee is paid under the new Act. Under the new Act, Twenty-four Dollars is extorted from buyers of grain instead of Ten Dollars as under the old Act, for the benefit of the same identical fund to be used for the same purpose. The burden on buying grain in interstate commerce in North Dakota is therefore increased more than two-fold by the new Act over the burden imposed by the old Act. In the State's brief (p. 27) it is stated that the average elevator capacity is only 2,500 bushels. Even so, the actual buyer's fee under the new law is practically double what it was under the old law.

MARGINS.—The new Act contemplates that the State Supervisor, like the State Inspector under the old Act, should regulate and control the margins at which grain is bought, and this purpose and plan to control margins is apparent even without reference to Section XXVII of the new Act. The new Act di-

rects the Supervisor to "supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit and confiscation of valuable dockage." This supervision is directly over the buyers of grain licensed as inspectors by the State Supervisor. Manifestly the electors of the State, interested, as they are, primarily in the price of grain, used this language in the Act in no meaningless sense. They intended the supervision to be actual and intended that the desired result—the prevention of what the State officials and farmers deemed unreasonable margins—should be accomplished. We submit that no other construction can be fairly given to this language in the light of the declared purpose of the act to "regulate the marketing" of farm products.

"Supervise" means a superior inspection, "to inspect with authority." It goes beyond a mere investigation. "Regulate" involves adjustment or control by rule. Both power to regulate and to supervise involve authority to direct and control. No other meaning can fairly be given them in this statute. These words are continually construed in statutes as conferring broad powers of control. Almost the only limitation on the power thus conferred is that the act to be regulated or supervised cannot be prohibited. The extensive power over interstate commerce exercised by Congress is conferred by the authority to "regulate" that commerce.

THE BOND REQUIRED FOR PURCHASING GRAIN EXCEPT UPON CASH PAYMENT THEREFOR.—The new law, like the old law, requires a bond for the faithful performance of the duties of public warehousemen. The new law, unlike the old, requires a separate bond from anyone buying or shipping grain for profit, who does not pay cash in advance for the grain so bought, such bond to be in an amount sufficient to cover the value of all farm products bought and not paid for in cash. It will be noted that this requirement is not limited to those who buy grain from farmers. It applies to anyone buying and shipping grain for profit in the State from any person.

It is a matter of general knowledge that grain is frequently bought to be paid for upon arrival at the terminal market. Sometimes a draft is attached to the bill of lading, sometimes not. Frequently grain is bought and sold on open account. At times, because of advances made to the country shipper, the balance of the account is against the seller. At other times, through the application of grain shipped, the balance is in favor of the purchaser. To require the buyer of grain to give bond sufficient to cover credits voluntarily extended by the sellers of grain is a direct, burdensome interference with the right of contract and with the right to freely purchase grain in interstate commerce.

In the defense of this provision of the new statute, counsel for the appellants state at page 30 of their brief that the court below modified the interlocutory injunction to permit the taking of bonds under Section IX of the 1922 Act. It is unfortunate that counsel has not more accurately set out the force of this order. It appears on page 21 of the record that it was made pursuant to a stipulation appearing on page 20. Neither the stipulation nor the order confers any authority upon the "Supervisor." Neither in the stipulation nor the order is any authority given to require the bond here complained of required from purchasers of grain on credit. Both the order and stipulation give authority to "the proper officials of the State of North Dakota * * * to require new bonds or additional bonds of warehouses and elevators in the State of North Dakota wherever and whenever in the judgment of such officials and the defendants herein, it may be necessary in order to adequately protect storage ticket holders in the State of North Dakota." This clearly refers to the penal bond to protect storage tickets required not only by the Warehouse Act of North Dakota, but by the Warehouse Acts of all wheat producing states. This is the penal bond required alike by the new and old Grain Grading Acts of North Dakota, of which the appellees could not fairly and do not complain. Manifestly the statement of coun-

sel in reference to the modification of this order of the court is wholly misleading and unfounded.

We invite the attention of the court to the provisions of these two Acts as shown in parallel columns in this brief. From such an examination it will clearly appear that the changes in the new Act, as compared with the old, are merely changes in terms. With the single exception of omitting a specific license fee for buyers, the changes do not even show an attempt to remove the objectional features of the old Act or to conform to the decision of this court in the Lemke case. The changes rather indicate an effort to shorten the Act and make it more appropriate for submission to the electors.

Upon the important point of "margins," it will be noted, for instance, that the duties of the State Inspector under the old Act were elaborately set forth in the various subdivisions of Section 2. Among them he was authorized to conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing of grain, and to establish a reasonable margin to be paid producers. Under the 1922 Act these two duties are consolidated in the provision of Section IV authorizing the Supervisor to investigate and supervise the marketing of grain, with a view of preventing unreasonable margins of profit. In fact, every duty imposed on the State Inspector by Section 2 of the 1919 Act is referred to in the 1922 Act, although in much briefer language.

We submit that, irrespective of the effect of Section XVII, in no respects is the new law less of an interference with and burden upon interstate commerce than was the old law, while in the respects of requiring a bond to purchase grain on credit and increasing the license fee required in order to engage in the business of buying grain in interstate commerce, the new law places added burdens upon that commerce.

I-2. SECTION XVII OF THE STATUTE OF 1922 EXPRESSLY ADOPTS AND MUST BE HELD TO AUTHORIZE THE DOING OF THE VERY ACTS WHICH WERE DETERMINED BY THIS COURT TO BE OBNOXIOUS TO THE FEDERAL CONSTITUTION.

The 1922 Act announces the purpose of the State to regulate the marketing of farm products. In Section IV it generally defines the manner in which this regulation shall be carried out, mentioning all the subjects of regulation which were mentioned in the old Act. It then provides in Section XVII that:

> "All of the duties and obligations which were *formerly performed* by the State Inspector of Grades, Weights and Measures and all of the obligations *placed upon him by law* are hereby transferred and made a part of the duties of the Supervisor of Grades, Weights and Measures."

We submit that this language carries its own interpretation and makes its own argument in support of our position—that it applies to every duty *formerly performed* by the Inspector under the old law, including the duty announced in subdivision (i), Section 2 of the 1919 Act:

> "To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills,"

and in Section 23 of the 1919 Act:

> "The State Inspector of Grades, Weights and Measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products."

Section XVII of the new law clearly takes cognizance of the fact that the State Inspector of Grades is no longer functioning as such, for it refers to the duties and obligations which *were formerly performed* by him. This clearly refers to his acts. He did, in fact, formerly fix margins. Those margins were in force and were complied with for a long period of time.

The new law requires the Supervisor to assume the duties *"formerly performed"* by the State Inspector. There is no basis for the suggestion that some of the duties *formerly performed* by the Inspector are not included in the duties transferred to the Supervisor under the new law.

Counsel for the State, realizing the necessity of giving Section XVII some effect, concedes that it transfers to the Supervisor the duties conferred on the Inspector by Chapter 241 of the Laws of 1919. Chapter 241 is an Act providing that the State Inspector of Grades, Weights and Measures shall be the "Inspector and Sealer of Weights and Measures." The Act then provides in detail the powers and duties of the Inspector of Weights and Measures. Thus Chapter 241 creates a new office—that of the Sealer of Weights and Measures—and confers upon the Inspector of Grades, Weights and Measures the powers and duties of this new office. It thus gives to one individual two official positions under distinct names. It is rather a forced construction of Section XVII to hold that by conferring on the Supervisor the duties of the State Inspector of Grades, Weights and Measures, thereby it confers on the Supervisor the office and duties of the Inspector and Sealer of Weights and Measures. Assuming, however, that Section XVII does have this force and effect, we cannot infer that that was the only intended force and effect of Section XVII. If that had been the intention, undoubtedly Section XVII would have conferred on the Supervisor not the duties of the Inspector of Grades, Weights and Measures, but the duties of the Inspector and Sealer of Weights and Measures.

Section XVII of the 1922 Act by its wording seems to refer to two groups of duties: The first, duties formerly performed by the Inspector. This aptly describes duties performed by the Inspector formerly under the Grain Grading Act of 1919. The second, obligations placed upon him by law. This would aptly describe duties now being performed by the Inspector under existing laws.

Section XVII confers on the Supervisor duties formerly performed by the Inspector of Grades, Weights and Measures. The Grain Grading Act of 1919 created the office of Inspector of Grades, Weights and Measures. It prescribed his duties and obligations in connection with that office. We submit it would be a forced construction of Section XVII to hold that its reference to duties formerly performed by this Inspector was not to the duties performed by him under the Act which created his title of Inspector and defined his many duties as Inspector.

The argument by the State that Section XVII should not be so construed because the Act of 1919 had been held invalid simply begs the question. Section XVII must be construed in connection with the other sections of the 1922 statute according to its terms and manifest meaning. It is part of a statute regulating the marketing of grain. The inference irresistibly follows that the duties and obligations conferred on the Supervisor by reference to the duties performed under a similar statute by a like official were duties and obligations related to the common purpose of the two acts.

Nor does it lie in the mouth of counsel representing the State to consent that this court should hold that the Supervisor, under the new Act, did not have authority to establish margins and thereby fix prices. The Act must be construed and given force, if at all, to carry out the manifest purpose and intent of the electors who passed it. The subject of margins is referred to throughout the Act. The establishing of margins is manifestly an important provision in the Act, and the one which naturally appealed to the electors and probably did more than any other provision to cause the passage of the Act. In the Lemke case, 258 U. S., at page 60, this court stated in answer to a similar suggestion made in that case:

> "It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid federal regulations of the same subject. But the features of this Act, clearly regulatory of interstate comerce, are

essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the Act. Without their enforcement the plan and scope of the Act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it."

We submit that Section XVII confers upon the State Supervisor, under the 1922 statute, the duties and obligations formerly performed by the State Inspector under the 1919 Act, except as the 1922 Act makes the unimportant formal changes we have heretofore discussed. The 1922 Act is in entire harmony with the exercise by the State Supervisor of the duty prescribed by Subdivision (i) of Section 2 and by Section 23 of the 1919 Act, making specific provision for establishing margins.

We submit that the statute of 1922 is a direct interference with the purchasing of grain in North Dakota in interstate commerce and places a direct burden upon that commerce; that in these respects it does not differ in any material or substantial manner from the statute of 1919 declared invalid by this court. This appears from a comparison of the two Acts, and the conclusion is made irresistible by the provisions of Section XVII of the 1922 statute, which clearly incorporates in the new Act the very provisions of the former Act which this court determined were in conflict with the Constitution.

II.

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922 CONFLICTS WITH THE UNITED STATES GRAIN STANDARDS ACT AND WITH ITS ADMINISTRATION AND ENCROACHES UPON THE FIELD OF REGULATION OCCUPIED BY IT.

It is now elementary that where the question is whether or not a State law is in conflict with a Federal law, the entire scheme and purpose of the Federal statute must first be considered.

For instance, in the case of *Savage v. Jones,* 225 U. S. 501, 533, which is the case, or at least the type of case, on which the appellant chiefly relies in connection with this phase of the case this court said:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

What then is the scheme and purpose of the United States Grain Standards Act?

The Circuit Court of Appeals of the 8th Circuit, in the course of its opinion holding that the North Dakota Grain Grading Act of 1919 conflicted with the United States Grain Standards Act, found that by the Federal act "Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce."

Farmers Grain Company of Embden v. Langer, 273 Fed. 635, 651.

The Secretary of Agriculture likewise considers that uniform inspection and grading of grain in *all* markets in the United

States is the principal purpose of the Federal act, when in service and regulatory announcements No. 36 at page 2 the Department of Agriculture states:

> "The principal purpose of the Grain Standards Act is to provide for the establishment of standards for each class of wheat, or other grain as the case may be, to be effective for the inspection and grading of such grain *at all markets* in the United States, and for the supervision of inspection and grading under those standards so that any particular lot of grain should be given the same grade anywhere in the United States."

Even the appellants do not pretend that the Federal act can serve any other purpose than to secure the uniform application of uniform grades to all grain included within interstate commerce. On pages 8 and 9 of the appellants' brief, the following statements appear:

> "It is the intent of said Act (the Federal Act) that all grain included within interstate commerce should be graded and inspected in accordance with the *grades* fixed by the Secretary of Agriculture under that act. *This is the single great purpose of the Federal act.*
>
> "We have seen that the purpose of the Federal act is to secure *the uniform use of certain grades and standards,* as fixed by the Secretary of Agruculture."

There is therefore no apparent difference of opinion as to the general scheme and purpose of the United States Grain Standards Act. It is obvious that in enacting this law, Congress reached the conclusion arrived at some time ago by Judge Sanborn in *Globe Elevator Company v. Andrew,* 144 Fed. 871, that

> "So important a matter as the fixing of grades in which grain in interstate transportation can be sold and without which it can not be sold on any large scale, admits of one uniform system or plan of regulation and only one."

The purpose of Congress in enacting the Grain Standards Act to secure the uniform grading of wheat and other grains in interstate commerce throughout the United States is, of course, to be found in the first instance in the act itself. The marked uniformity of opinion on the subject is merely the result of

necessary implication from the terms of the act. It stands admitted, and can not with any semblance of justification be disputed, that Congress has undertaken to supervise and regulate the grading of grain in interstate commerce with a view to securing the uniform application of standardized grades.

Turning then to the other legislation involved, what is the purpose of the North Dakota Grain Grading Act of 1922?

To determine this it is unnecessary to go beyond the express statement of the North Dakota legislature in the preamble to the Act.

> "An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading wheat and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouse handling such farm products; and making an appropriation therefor."

That "the marketing of farm products" in North Dakota is interstate commerce has been conclusively settled, at least insofar as wheat and other small grains are concerned, by the decision of this court in the Lemke case. Obviously therefore insofar as the general scheme and purpose of the two Acts are concerned, they are each designed to apply to the same subject matter. The Federal government, in the exercise of its undisputed power to regulate interstate commerce, has seen fit to adopt an Act intended to accomplish the uniform application of standardized grades to all grain in interstate commerce; and North Dakota has attemtped to supplement the Federal Act by compelling the application to all grain sold in interstate commerce in North Dakota of the Federal standards, but under the North Dakota Act this application is to be made under the supervision of and regulation by the State officials and not the Federal officials.

It is a matter of common knowledge that the terminology

used in grading grain is of no material importance; that the important feature of grain grading is the exercise of judgment by the person doing the grading. For instance, we find that under the regulations promulgated by the Department of Agriculture under the Grain Standards Act, there are five classes of wheat, each one divided into three sub-classes and each sub-class re-divided into five grades. We find that Red Winter wheat, which is one of the sub-classes of Soft Red Winter wheat (class 4) is described as follows:

> "This sub-class shall include wheat of the class soft red winter consisting of both light and dark colored kernels. This sub-class shall not include more than 10% of soft red winter wheat possessing the characteristics of wheat of this class as grown west of the great plains area of the United States."

Or again we find Dark Northern Spring wheat, one of the sub-classes of Hard Red Spring wheat (class 1) is described as follows:

> "This sub-class shall include wheat of the class hard red spring consisting of 75% or more of dark, hard and vitreous kernels. This sub-class shall not include more than 10% of wheat of the variety hump backed."

It is apparent that the grading of wheat can not be done with mathematical precision. What are the characteristics of soft red winter wheat as grown west of the great plains area of the United States? When is the kernel a dark, hard and vitreous kernel? These are questions on which the judgment even of experts must necessarily differ. Furthermore, we find in the regulations promulgated by the Department of Agriculture specific instructions as to the manner of determining the test weight of grain per bushel; the manner of determining the percentage of dockage contained in the grain and detailed specifications of the apparatus prescribed for use in grading grain.

From the foregoing it is manifest that the mere establishment of standard grades for grain does not and can not assure the giving of the same grades to all grain of a similar quality

and condition. These standard grades simply furnish the terminology by which the results of an inspection can be made known. They do not insure uniform inspection. This can only be insured by a single control and supervision over inspectors, and the existence of a separate and independent control and supervision by State officials over the inspection and grading of grain purchased in interstate commerce in North Dakota necessarily and inevitably defeats the whole scheme and purpose of the Federal Act to procure the uniform application of standardized grades.

The vital importance of a single control and supervision over the manner in which grain grades are applied in bringing about uniformity in the grading of grain was clearly recognized by Congress in the Grain Standards Act by *requiring* the Secretary of Agriculture to issue Federal licenses to all persons authorized to inspect and grade grain under the laws of any State having a grain inspection department. This proviso was obviously inserted to enable the harmonious administration of State grain inspection laws as applied to intrastate transactions and the Grain Standards Act as applied to interstate transactions. It enables the Federal authorities to exercise the necessary control and supervision over State grain inspectors whenever they grade grain in interstate commerce.

With this provision in force there is a simple and obvious means available to any State whereby they can readily provide for impartial and disinterested inspectors and the grading of grain in interstate commerce under the supervision of the Department of Agriculture. The adoption of such a system results in the harmonious and efficient administration of Federal and State laws and is entirely consistent with the purpose of the Federal Act to procure the uniform application of Federal grades. Such a system does not, however, give to the State authorities any control or supervision over the grading of grain in interstate commerce. The State inspectors are also Federal inspectors and when they enter the field of interstate commerce

their decisions are subject to review by the Federal authorities and not by the State authorities.

This system, however, was not satisfactory to North Dakota because North Dakota was not interested in procuring a fair and uniform application of the Federal grades but was interested in and determined to procure the control and supervision by the State authorities over the grading of grain. This is the only conceivable explanation of the requirement of the North Dakota statute that the buyers of grain take out licenses to grade. The State has intentionally selected a class of grain inspectors who are not qualified as inspectors under the Federal Act. In this manner they have sought to divest the Federal authorities of all control over the grading of grain in interstate commerce in North Dakota and have sought to defeat the single great purpose of the Grain Standards Act. The North Dakota Act not only applies to the same subject matter as the Federal Act but is an obvious attempt to defeat the purpose which Congress has sought to accomplish.

The jealousy between State and Federal departments which come in contact is a matter of common knowledge. It has been the cause of frequent and extended litigation. Even now there is pending in Minnesota litigation involving a serious controversy over the relative rights of the State and Federal governments in the control and regulation of the stockyards. From time to time this jealousy becomes so inflamed in some section of the country that it leads to local legislation designed to prevent the accomplishment of some great purpose which Congress, in the exercise of the powers conferred upon it, has undertaken to accomplish. Whenever this situation has arisen this court has never failed to put its stamp of disapproval in no uncertain terms on such efforts to hamper and impede the effective exercise by the Federal government of the functions and powers conferred on it.

So it was that Wisconsin was reprimanded for attempting to defeat the effective enforcement of the Federal Pure Food

Act in *McDermott v. Wisconsin,* 228 U. S. 115; and statutes of Texas and North Carolina were held invalid because they conflicted with the great purpose which Congress sought to accomplish by the Interstate Commerce Act, "whereby Congress has taken control of the subject of rate making and charging," in *Gulf, Colorado & Santa Fe. R. R. Co. v. Hefley,* 158 U. S. 98, and *Southern Ry. Co. v. Reid,* 222 U. S. 424, and the courts of Texas were rebuked for attempted interference with the general scheme of the Interstate Commerce Act in *Texas & Pacific Ry. Co. v. Abelene Cotton Oil Co.,* 204 U. S. 426.

It is not possible that this court which has at all times been the defender of the rights and supremacy of the national government in the exercise of powers delegated to it, will not recognize in the North Dakota Grain Grading Act of 1922 a thinly veiled defiance of, and rebellion against, the accomplishment of the avowed purpose expressed by Congress in the Grain Standards Act.

It is futile to argue that the sale of grain in North Dakota is a distinct and separate field which Congress has not sought to regulate. It is an undisputed fact that the uniform application of standardized grades, to be accomplished through a single control and supervision, is the object which the Grain Standards Act is aimed at. The means by which this object shall be attained are exclusively for the determination of Congress. Congress has passed a law which, in its judgment, is designed to effect a recognized purpose, and any omission from, or limitation in, such an Act are just as much the will of Congress as the expressed provisions of the Act. The Federal government has expressed its purpose to take over the supervision and regulation of the inspection and grading of grain in interstate commerce. Having done so, its right of supervision and regulation is clearly exclusive. Congress has expressed a purpose to bring about uniformity in the grading of grain in interstate commerce. Having undertaken to accomplish this result, it devolves upon Congress alone to determine the extent of the

supervision and regulation necessary to bring about the desired result. If, in seeking to accomplish its purpose, Congress leaves any particular type of transaction unregulated, it can only be because it considered regulation of such a transaction undesirable unnecessary to accomplish its purpose.

No other body can go behind the purpose or result sought by Congress and set up regulations which they consider desirable on the pretense that by failing to make such regulations Congress has left the field open to them. The action of Congress pursuant to an admitted purpose involves not only a determination of what regulations are necessary but also a determination of what regulations are unnecessary, and this determination is final. The Grain Standards Act, involving, as it admittedly does, an expression of the purpose of Congress to establsh uniformity in the grading of grain in interstate commerce, constitutes not only a decision by Congress as to what must be regulated in order to bring about the desired result, but also a decision as to what should not be regulated, and, if, as the appellants contend, the Federal government has not attemtped to regulate or supervise the grading of grain at the time of the sale by the producer to the local elevator in North Dakota, it must be assumed that this omission is intentional and was considered undesirable unnecessary to accomplish the purpose of the Act.

This principle was stated by this court in *Northern Pacific Railway v. Washington*, 222 U. S. 370, 378, as follows:

> "It is elémentary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

Under such circumstances it can not be contended that the state is simply supplementing the action of the federal authorities. This was clearly brought in *Erie Railroad Company v. New York*, 233 U. S. 671, 683. The Act of Congress involved

in that case was the so-called "Hours of Service" law limiting railroad employees to a nine-hour day. New York adopted a law limiting certain railroad employees to an eight-hour day. In face of the contention on the part of the State that in so doing New York was simply supplementing the Federal legislation and increasing the margin of safety prescribed by the Federal law, this court held the State Act unconstitutional as in conflict with the Federal law. The following quotation from the opinion of Mr. Justice McKenna is instructive and directly applicable to the case at bar:

> "The reasoning of the opinion and the decision oppose the contention of defendant in error and of the Court of Appeals, that the state law and the Federal law can stand together, because, as expressed by the Court of Appeals, 'the state has simply supplemented the action of the Federal authorities,' and, on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the Federal statute, although 'not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary.'
>
> We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.
>
> Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

Applying these principles to the present case, we find that Congress has expressed its purpose to exercise its unquestioned right to control interstate commerce in grain with the object of bringing about uniform grading and has amply authorized

the Secretary of Agriculture to establish such regulations as he may deem necessary to carry out this purpose. This court clearly pointed out in the Lemke case that the original sale of the grain in North Dakota is a part of this interstate commerce in grain which the Secretary of Agriculture has been authorized to regulate. The Act and the regulations promulgated thereunder may not be entirely satisfactory to certain groups or sections but they can not be regarded as having been promulgated without due consideration of the public interest and they admit of no supplement; they are the prescribed measure of what is necessary and sufficient for the public interest. The State of North Dakota by its Grain Grading Act of 1922 seeks to establish a separate, distinct and independent control of the grading of grain in interstate commerce, which is not consistent with uniformity and is diametrically opposed to the purpose which Congress has so clearly manifested.

It is significant that by the presentation of two of the Bills to which we have already called the court's attention, Congress has been asked to amend the Grain Standards Act by specific provision that it shall not be held to apply at any time prior to the delivery of the grain to a carrier, and by the third Bill referred to, Congress was asked to exclude from interstate commerce all transactions prior to the delivery of the grain to a carrier. These suggestions were all made after the decision in the Lemke case. It follows that whatever might be said as to the intention of Congress at the time of the original passage of the Grain Standards Act, it is now clear, beyond the possibility of doubt, that Congress fully understands its right to regulate the original purchase of the grain in North Dakota and has specifically refused to admit the right of the State of North Dakota to regulate this transaction.

The failure of Congress to pass these bills is a further expression of its determination that in order to accomplish the purpose of the Grain Standards Act it is not necessary or desirable to have the grading of grain in interstate commerce

regulated or controlled beyond the regulation and control provided for by the Grain Standards Act. By the presentation of these bills their North Dakota proponents inferentially but none the less clearly indicated their opinion that in the absence of some such qualifying legislation there is no room for State interference. By refusing to adopt the suggested qualifications Congress has expressed its intention that there shall be no interference by the states.

Again we can not refrain from calling attention to this court's comments in the Lemke case in answer to the claim that the interest of the farmer demands some regulation of the purchase of grain in North Dakota. There is no need to either concede or argue this question. If it be true, the remedy lies with Congress, which is amply authorized to adopt any measures which may be necessary. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of state laws made in defiance of national legislation. Apparently North Dakota is unable to convince Congress of the need of additional legislation. If so, the necessary inference is that the inconveniences and wrongs are entirely imaginary. This we believe is the true situation.

THE CASES SUSTAINING STATE LEGISLATION IN FIELDS WHICH HAVE NOT BEEN OCCUPIED BY CONGRESS ARE NOT IN POINT AND ARE NOT APPLICABLE TO THE PRESENT SITUATION.

Savage v. Jones, 225 U. S. 501, is typical of the cases applying this principle. In that case certain state legislation was claimed to be in conflict with the Federal Food and Drugs Act. As to the object and purpose of the Federal legislation this court found at page 529 that:

> "The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act.' The purpose is to keep such articles 'out of the channels of inter-

state commerce, or, if they enter such commerce to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages.' "

The state legislation which was attacked required that before any feed of the character covered by the Act should be sold, there should be filed with the state officials certain information regarding the manufacturer and the ingredients of the feed and that similar information should be plainly printed on every package.

Obviously, there was no conflict here. *The Federal Act did not undertake to establish any uniform rule.* Its object and purpose, as found by this court, was a negative and limited one, namely, to prohibit interstate commerce *in certain specified articles.* It did not attempt to establish any uniform standard for determining the purity of food. It was on its face not an exclusive measure but one which selected certain of the more glaring offenses and condemned them, and it was for this reason that this court found that the failure on the part of Congress to condemn the acts which were condemned by the state statute did not involve a determination by Congress that such acts should not be prohibited. In other words, there was no indication that Congress had undertaken to establish a uniform and exclusive rule for the regulation of all interstate commerce transactions.

In this respect the Grain Standards Act is fundamentally different from the Food and Drugs Act. It has no other purpose than the establishment of uniform grading of grain. If it fails in its accomplishment of this purpose it can serve no conceivable purpose and it is this very purpose with which the North Dakota Act conflicts. There can not be uniform grading of grain in interstate commerce if both statutes are effective.

When the case arose where a state did attempt to interfere with the accomplishment of the limited purpose of the

Food and Drugs Act, it did not escape condemnation on the principle of *Savage v. Jones.*

McDermott v. Wisconsin, 228 U. S. 115.

All of the other cases which have been decided on the principle of *Savage v. Jones* involve Federal legislation of a character similar to the Food and Drugs Act. *Corn Products Refining Company v. Eddy,* 249 U. S. 427, also arose under the Food and Drugs Act and was decided on the authority of *Savage v. Jones* because here again the state statute could be sustained without impairing, in the slightest degree, the operation and effect of the Federal Act, there being no question involved of conflicting standards and there being no evidence of any purpose which Congress sought to accomplish which would be defeated by the state legislation.

The same situation has led to the same result in the cases involving state legislation alleged to conflict with the Federal Animal Industry Act.

Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S. 613.
Asbell v. Kansas, 209 U. S. 251.
Reid v. Colorado, 187 U. S. 137.

In the case last cited, the court carefully examined the national legislation and concluded that Congress had not undertaken to establish any general system for suppressing and extirpating contagious, infectious and communicable diseases dangerous to the health of domestic animals, and that the state legislation designed to accomplish this purpose was not in conflict either with the express terms or the general purpose of the national legislation.

The distinction between the cases upholding state legislation because it occupies a field not covered by a Federal statute and the cases condemning state legislation, even though it applies to transactions not specifically covered by the Federal Act, lies in the nature of the Federal Act. If there is no general pur-

pose which the Federal Act seeks to accomplish, which would be defeated by state legislation, then it remains open to the states to legislate on subjects not specifically covered by the Federal Act. If, on the other hand, the Federal Act has as its object a definite general purpose, then an omission on the part of Congress to cover a particular transaction within that purpose is an expression of its determination that it is unnecessary to cover such a transaction in order to accomplish the purpose in view. Obviously, the Grain Standards Act falls within the latter class. It has and can have but one purpose, i. e., the establishment of uniform grading of grain in interstate commerce. The grading of any grain in interstate commerce therefore falls within its scope and if it is not covered specifically it is only because Congress has said it shall not be.

IN ADDITION TO THE FACT THAT THE NORTH DAKOTA GRAIN GRADING ACT DEFEATS AND INTERFERES WITH THE ACCOMPLISHMENT OF THE SOLE PURPOSE OF THE GRAIN STANDARDS ACT, THERE ARE CERTAIN SPECIFIC PROVISIONS IN THE TWO ACTS WHICH WILL NECESSARILY COME IN DIRECT AND IMMEDIATE CONFLICT IF THE TWO ACTS ARE CONCURRENTLY ADMINISTERED.

As already point out, under the 1922 North Dakota Act grain purchased in North Dakota will necessarily be graded by employees of the elevator companies. It is the grain buyer who must take out a license from the State of North Dakota. The authorized State inspectors will be persons directly interested in the grain elevators. Such persons, however, are not competent to become Federal inspectors under the Grain Standards Act which provides that:

> "No person licensed by the Secretary of Agriculture to inspect or grade grain, or employed by him in carrying out any of the provisions of this Act, shall, during the term of such license or employment, be interested financially or otherwise, directly or indirectly, in any grain elevator or warehouse or in the merchandising of grain, nor shall he

be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

North Dakota licensees therefore can not be Federal inspectors; but the Grain Standards Act by Section 7 *requires* the Secretary of Agriculture to "issue licenses to the persons duly authorized and employed to inspect and grade grain under the laws of any state which has a grain inspection department." Obviously, the Secretary of Agriculture can not comply with this requirement of the Grain Standards Act without violating its prohibition against interested inspectors.

In this respect the 1919 North Dakota Act was substantially similiar to the 1922 Act and when these features of the State and Federal Acts were called to the attention of the Circuit Court of Appeals of the 8th Circuit in the Lemke case, the court said:

> "Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the Federal law, if the business is interstate commerce."
>
> *Farmers Grain Company of Embden v. Langer,* 273 Fed. 635, 652.

Another direct conflict results from the fact that the State Act taken in connection with Sections 3107, 3113 of the North Dakota 1913 Compiled Laws requires a transaction which is expressly prohibited by the Federal statutes.

Section 3107 defines a public warehouse as an elevator operated "for the purpose of buying, selling, storing, shipping or handling grain for profit." Section 3113 is as follows:

> "What Storage Receipts Shall Express. Each storage receipt issued in this state shall expressly provide that at the option of the holder of such receipt the kind, quality and quantity of grain for which such receipt was issued shall be, on his demand, delivered back to him, at any terminal point or at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storage and insurance charges; and in case of terminal delivery the payment, in addition to the

above, of the regular freight charges on the gross amount called for by the tickets being surrendered—such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt, but no charges shall be made for cleaning grain unless such grain has been actually cleaned. Nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade; provided, that grain placed in a special bin be excepted from the provisions of this section."

These sections were not repealed by either the 1919 Act or the 1922 Act. Under the State law, therefore, a person can take grain to any country elevator and have it inspected and graded by the State Licensee. Necessarily the grade given the grain will be one of the United States standard grades. He may store this grain and the elevator operator is required to give him a receipt for the amount of grain so stored, designating the grade. This receipt must contain a provision that on the payment of the freight charges to any terminal, the holder is entitled to grain of the same grade at that terminal or a terminal warehouse receipt for such grain. These warehouse receipts may be transferred. By the sale and transfer of the grain covered by the receipt, any one can receive delivery at the Minneapolis terminal of that grain on payment of the storage charges and the freight. The Federal statute, however, in terms provides that:

"No person thereafter shall ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade unless the grain shall have been inspected and graded by an inspector licensed under this Act and the grade by which it is sold, offered for sale or consigned for sale be one of the grades fixed therefor in the official grain standards of the United States."

The dockage requirements of the North Dakota statute neces-

sarily lead to a conflict with the Federal system of grading. Under the state law the buyer is compelled to make a specific payment for dockage. At the terminal markets he is required by the Federal law to sell his grain under the Federal grading system which makes no provision for a specific payment on account of dockage. The regulations of the Secretary of Agriculture do require the Federal inspector to determine the quantity of dockage and to state the same on his certificate in terms of percentage as a part of the grade designation, and grain containing a large amount of dockage frequently brings a premium price. This dual system necessarily leads to confusion and conflict.

Another source of conflict is found in the situation which is most accurately analyzed in the following passage from the decision of the Circuit Court of Appeals in the Lemke case:

> "Section 4 of the Grain Standards Act heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the Act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the Act to or through any place which an inspector licensed under the Act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the Federal Act to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal Inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the State Inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws

clearly in conflict, if they both have to do with interstate commerce."

Farmers Grain Company of Embden v. Langer, 273 Fed. 635, 651.

By far the most grevious conflict between the two statutes results from the dual inspection which would necessarily result from the concurrent administration of the two Acts.

Although the 1922 North Dakota Act provides for the adoption of Federal standards and grades, the situation in this respect is no different from what it was under the 1919 Act because under the former Act the North Dakota officials did in fact adopt the Federal grades. We have already seen that the mere adoption of grades does not insure their uniform application which can only be assured by a single supervision and control.

The situation can not be judged by an examination of the situation existing in states having admittedly valid warehouse statutes of the usual and permissible sort. In Minnesota, for instance, grain inspectors are impartial and disinterested persons. On the adoption of the United States Grain Standards Act and the establishment of grades thereunder, Minnesota, like North Dakota, adopted as its standards the United States standards but in Minnesota, unlike the situation which would exist under the North Dakota Act, state inspectors are qualified to and do in fact take out licenses as Federal inspectors and when grading grain in interstate commerce they are subject to the supervision of, and their decisions are subject to review by, the Department of Agriculture. The two systems can therefore operate harmoniously and result in uniform grading of grain in Minnesota which would not be the case under the North Dakota Act.

The dual inspection which North Dakota seeks to establish will necessarily result in overlapping and conflicting regulations, unnecessary license fees, and a substantial burden on every person engaged in commerce in grain. The buyer in

North Dakota must buy under the rules and regulations promulgated by the State authorities; he must sell under the rules and regulations established by the Secretary of Agriculture. Any appeal on questions arising out of the purchase of grain must go to the State officials and any appeal on any question arising out of the sale of grain must go to the Federal authorities. At no point and by no process can he obtain one ruling or regulation covering both ends of his commerce in grain. The uncertainty, inconvenience and hardship which necessarily result from such a situation are obvious.

The record in the Lemke case shows that under the 1919 Act there was no uniformity between the application of grades by the North Dakota officials and their application by the Federal officials. As the North Dakota officials and the Federal authorities would determine the grade of grain independently each would necessarily conflict with the other. Such a conflict is not a theory but a continually existing fact. Obviously the purchaser of grain in North Dakota is between two mill stones independently operated and controlled. Statutes resulting in such a situation are clearly in conflict.

The usual warehouse Act of the type sustained in *Munn v. Illinois* has been held not in conflict with the Grain Standards Act (*Merchants Exchange v. Missouri,* 248 U. S. 365). This was on the stated ground that the State Act applied only to the weighing and warehousing of grain and did not purport to establish a system of grading and inspection applicable to all transactions in grain. Justice Brandeis makes this distinction clear when he says in that case:

> "That Act (the Federal Act) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain."

In conclusion we can not do better than quote the language of the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer,* 273 Fed. 635 at page 651, where the 1919

North Dakota Act was under consideration.

> "There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then, of course, any attempt to regulate that commerce by the State of North Dakota is in direct conflict with the Grain Standards Act, wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both Acts ought not to be and cannot be enforced, without confusion and embarrassment as the State Inspector declared."

We submit that the conflict between the two statutes is actual and substantial; that the State Act encroaches upon the field of regulation occupied by the Federal Act and would defeat and interfere with the purpose sought to be accomplished by the Federal Act; that the State Act conflicts with the Federal Act and the concurrent administration of the two Acts would result in wholly unwarranted and unnecessary confusion and embarrassment.

III.

THE 1922 ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THE SAME MANNER AS THE 1919 ACT.

The North Dakota statute authorizes and empowers the State Supervisor to revoke the license of any buyer, and thereby prohibit him from continuing his business of buying grain in interstate commerce, without any notice and without any opportunity afforded for a hearing. The provision for an appeal to the court from arbitrary action in this does not afford the buyer sufficient protection. He would have the right to resort to the courts to prevent such action whether there were

any provision for an appeal or not. In the meantime, however, he is deprived of the right to carry on his business and if such action were taken in the midst of the busy crop moving season, he would lose practically a year's business before the wrong could be remedied by the courts.

To prohibit in this manner the profitable use of elevators is just as much a confiscation and destruction of property as it would be for the state to actually take possession of the elevator itself. While in the earlier cases there is some confusion as to what circumstances justify a summary confiscation or destruction of property under the due process clause, it has now become well established that the nature of the property is the determining factor in each case and that in order to justify such a confiscation or destruction, the state must be prepared to show that the property is dangerous to the safety or health of the community, otherwise it can only be condemned or destroyed by legal proceedings with due notice to the owner.

Sentell v. New Orleans, etc. R. R. Co., 166 U. S. 698.

1. An elevator is property of substantial value. The business of conducting it is not a public nuisance. The property is obviously of such a nature as to require legal proceedings for its confiscation and, within the rule cited above, the taking of such property or depriving the owner of the use of it without legal proceedings deprives the owner of his property without due process of law as guaranteed by the Fourteenth Amendment.

2. The limitations and restrictions placed by the North Dakota statute on the terms on which grain may be bought in North Dakota, constitute an unlawful restriction of the liberty of contract guaranteed by the Fourteenth Amendment. As already indicated, the North Dakota statute provides for, or contemplates rules and regulations providing for, the fixing of the price at which grain can be purchased in North Dakota, the specific payment for dockage or its return to the

seller, the licensing of buyers as a condition precedent to their right to purchase grain and the giving of security by the buyer whenever he purchases on credit. In short, the statute purports to make the contract between the buyer and the seller for them and without regard to their wishes. If this statute remains in force, no grain can be bought in North Dakota excepting under a contract of purchase, every important term of which is fixed by, or subjected to regulation by, the state authorities. Such a situation is a clear violation of the constitutional guarantee of liberty of contract.

In the insurance case (*German Alliance Insurance Company v. Kansas,* 233 U. S. 389), and in the rent cases (*Block v. Hirsh,* 256 U. S. 135, 65 L. Ed. 531, and *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170, 65 L. Ed. 539), we find the border line of the legislative power to regulate contracts. These decisions rest on existing situations. In the insurance case, because of the nature of the business, a few companies had obtained control of the rates of insurance and all persons desiring protection were obliged to deal with these companies. This condition does not exist in the grain business. Twenty-two hundred elevators compete with each other in buying grain. Many of them are farmers' co-operative companies. These co-operative companies establish the conditions under which grain is bought at country elevators. A producer is not dependent upon the country elevator. He may ship his grain to a terminal market. There is not and cannot, in the nature of things, be a control of market conditions of grain buyers similar to the control of insurance rates by the large companies. The rent cases involved an extarordinary and peculiar public hardship and necessity. Legislation regulating the marketing of grain falls outside the boundary line of legislative control of contracts established by the insurance and rent cases.

We submit that the North Dakota statute constitutes an infringement of rights guaranteed by the Fourteenth Amendment as well as a direct and substantial burden on interstate com-

merce and a source of conflict with the United States Grain Standards Act.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1924.

George F. Shafer, Attorney General of North Dakota, et al., Appellants,
vs.
Farmers Grain Co. of Embden, et al.
} Appeal from United States District Court for North Dakota.

[January 5, 1925.]

This cause is restored to the docket for reargument on all the questions involved, particularly including the following:

1. Whether the North Dakota statute of 1922 differs materially in its provisions and operation from the statute of 1919 which was held invalid by this Court in *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, and *Lemke* v. *Homer Farmers Elevator Co.*, 258 U. S. 65.

2. Whether and to what extent section 17 of the statute of 1922 gives effect to and continues in force the provisions of the statute of 1919.

3. Whether and in what particulars the statute of 1922 encroaches upon the field of regulation occupied by the United States Grain Standards Act or conflicts with that Act or with its administration.

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1924.

George F. Shafer, Attorney General of North Dakota, et al., Appellants,
vs.
Farmers Grain Company of Embden, et al.

Appeal from the District Court of the United States for the District of North Dakota.

[May 4, 1925.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to restrain the enforcement of the North Dakota Grain Grading Act, an initiated measure approved at a state election November 7, 1922. North Dakota Laws 1923, p. 549. The plaintiffs own and operate country elevators within the State, at which they buy wheat from farmers for shipment to markets in other states; and the defendants are officers of the State, who are charged by the Act with the duty of enforcing it. The plaintiffs challenge the validity of the Act under the Constitution of the United States on the grounds, first, that it interferes with and burdens interstate commerce, and, secondly, that it conflicts with the United States Grain Standards Act, c. 313, 39 Stat. 482. An injunction preventing its enforcement pending the suit was granted by the District Court, three judges sitting; and that interlocutory decree is here for review under section 266 of the Judicial Code, as amended March 4, 1913, c. 160, 37 Stat. 1013.

A prior statute concededly "having the same general purpose" was adopted by the state legislature in 1919 and held invalid by this Court in *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, as an interference with interstate commerce. There are differences between that statute and the present one, of which the parties take divergent views. It would serve no purpose to take up these differences in detail. We shall describe the situation to which the

present Act is intended to apply, state its material provisions, and then come to its operation on interstate commerce.

Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent. is used and consumed locally, and about 90 per cent. is sold within the State to buyers who purchase for shipment, and ship, to terminal markets outside the State. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from the farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his grain stored in the country elevator, or shipped to a terminal elevator for storage, and awaits a possible increase in price; but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market if it has not already gone there.

The price paid at the country elevators rises and falls with the price at the terminal markets, but is sufficiently below the latter to enable the country buyer to pay for the intermediate transportation and have a margin of profit. All transactions at the terminal markets, including the price, are based on the grade of the wheat, and by reason of this all buying at the country elevators is by grade.

The grading at the terminal markets is done by inspectors licensed under the United States Grain Standards Act, who are required to apply to all interstate shipments the grading standards promulgated under that Act by the Secretary of Agriculture. There are no inspectors licensed under that Act at the country elevators; and so the grading is done there unofficially by the buyers or their agents as an incident and part of the buying.

Grading includes an ascertainment of the proportions of clean wheat and of dockage in each lot of grain and an ascertainment of the quality of the wheat. Dockage consists of separable foreign material, such as dirt, pieces of straw, chaff, weed stems, weed seeds and grain other than wheat. Its proportion varies in

different lots, but generally is less than five per cent. When not separated it causes the grain to bring a lower price per bushel than clean wheat would bring. When separated it has a value for poultry and stock feed which usually is in excess of the cost of separation. Occasionally the farmer separates it at the farm and sells only the clean wheat, and occasionally the buyer separates it at the country elevator, charges the farmer for that service, and buys and ships only the clean wheat; but generally the grain is sold by the farmer and shipped by the country buyer with the dockage included. The influence of dockage on the value of the grain and the current modes of handling it are shown in publications of the Agricultural Department of the United States, pertinent excerpts from which are set out in the margin.[1]

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[1]Extracts from Farmers' Bulletin No. 1118, United States Department of Agriculture, pp. 5, 21:

"The foreign material in wheat may seriously affect its value in that it often increases the cost of milling, and causes injury to the baking qualities of flour. Therefore, that factor is considered in the inspecting and grading of wheat. The amount of dockage present has a bearing upon the commercial value of a lot of wheat. Especially when present in large amounts, it is a factor of considerable importance to the parties interested in the marketing or storage of grain."

"All of the following methods of handling dockage are employed in normal times and all are generally found to be satisfactory:

1. The wheat is cleaned on the farm and only the clean wheat is hauled to market.
2. The wheat delivered by the farmer is run over the proper cleaning machinery at the country elevator or mill, and the dockage is separated and returned to the farmer.
3. The wheat is screened by the local buyer, payment is made to the seller on the basis of the grade of the clean wheat only, and the dockage is retained by the elevator or mill as compensation for services in removing it.
4. The wheat is screened by the local buyer, payment is made to the seller on the basis of the grade of the clean wheat, and the dockage is retained by the elevator or mill, and if the value of the dockage separated exceeds the cost of separation, payment is made for it.
5. The wheat containing the dockage is consigned to the large market by the country mill or elevator, where the dockage is separated and its value is taken into consideration in connection with the price paid for the entire carload of dockage-free wheat. In some localities it is the practice to make a small charge for such services, while in other localities the services are performed without cost.
6. The wheat containing the dockage is sold to a local buyer, who in turn consigns it to the terminal market with the understanding that the price secured will be based upon the commercial value of both the wheat and the dockage.

The first two methods mentioned, in which only the screened wheat is delivered to the local buyer, tend to minimize the differences of opinion with

As many as 2,200 country elevators are operated within the State in the business here described—generally two or more by competing buyers at each station. Some of the buyers are individuals and others are corporations. A large number are farmers' cooperative companies, which buy grain grown by their stockholders and others in the vicinity of their elevators, ship and sell the same, and distribute as patronage dividends the surplus arising from such transactions—no profit being retained by the companies.

The plaintiffs comprise many buyers, individual and corporate, including 11 farmers' cooperative companies. In the aggregate

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regard to the grade of wheat delivered and therefore establish greater confidence in the grades given by the local buyer. Furthermore, these methods enable the farmer to utilize the foreign material for feed or to sell it locally."

Extracts from Farmers' Bulletin No. 1287, United States Department of Agriculture, pp. 5, 21:

"The benefits derived from clean wheat are shared by the farmer and the country elevator. If the farmer cleans his wheat before delivering it to the elevator he saves the cost of hauling the dockage to market, and he may be able to use it to advantage for feed, and make a saving in his feed bill. In many cases these savings will repay the farmer for the time and trouble required to clean his wheat. The contention as to the amount of dockage in the wheat which frequently arises between the farmer and the elevator operator will be avoided if clean wheat is delivered. The price paid for clean wheat at the elevator is usually more per bushel than the price paid for unclean wheat, because the elevator operator must consider either the cost of removing the dockage or the freight charges on it to the terminal market."

"The farm is the logical place to clean wheat, preferably as part of the thrashing operation, because the necessary power is available and later handling is avoided. Since satisfactory cleaning is not always possible under present conditions at thrashing time, other means of cleaning must be used.

The fanning mill is the most practical cleaning machine for farm use, and if properly adjusted and operated will clean wheat satisfactorily for commercial purposes with but little loss of wheat in the screenings."

"The operators of country elevators are beginning to realize more keenly each year that it pays to clean wheat before shipping it to the terminal markets. Many of the country elevators not only clean wheat for themselves but for the farmers as well. The latter is known as 'custom cleaning,' for which country elevators located in the central Northwest ordinarily charge from 2 to 3 cents per bushel, based on the gross weight of the grain before cleaning. A higher charge is made for cleaning the grain for seed purposes. The shrinkage in the weight of the grain is borne by the owner, but the screenings may be returned to him. The returns from custom cleaning add a considerable amount to the income of some country elevators during the year."

they own and operate several hundred country elevators, widely distributed over the State, and buy and ship about 30,000,000 bushels of wheat a year. They carry on the business severally, each buying and shipping independently of the others. All buy with the purpose of shipping to and selling in terminal markets outside the State and carry out this purpose in the manner already described.

The North Dakota Act in terms covers all farm products, but as it is chiefly aimed at dealings in wheat and the parties have discussed it on that basis, our statement of its provisions will be shortened by treating them as if relating only to wheat.

The title to the Act describes it as one whereby the State undertakes (a) "to supervise and regulate the marketing" of wheat, (b) to prevent "unjust discrimination, fraud and extortion in the marketing" of such grain, and (c) to establish "a system of grading, weighing and measuring" it. The first section declares the purpose of the State to encourage, promote and safeguard the production of wheat and commerce therein by establishing a uniform system of grades, weights and measures. The second and third sections provide for a State Supervisor of Grades, Weights and Measures and give him authority to make and enforce necessary orders, rules and regulations to carry out the provisions of the Act.

The fourth section provides that the Supervisor shall establish a system of grades, weights and measures for wheat "and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices"; declares that whenever grades, weights and measures for wheat are established by the Secretary of Agriculture under the United States Grain Standards Act they shall become the grades, weights and measures of the State; and concludes by saying, "In establishing such grades, weights and measures, the value of dockage shall be considered, and the buyer shall not be permitted to retain the same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer." The fifth section provides that no person shall buy any wheat "by grade"—excepting where one producer buys from another producer—unless it has been inspected and graded by a

licensed inspector under the provisions of the Act, or those of the United States Grain Standards Act, and is bought by a grade fixed and recognized thereunder.

The sixth section provides for the issue, by the Supervisor, of licenses to grade to persons engaged in buying, weighing and grading wheat—including buyers and agents at country elevators—where they pass a satisfactory examination. Each license is to be held on condition that the licensee shall honestly and correctly determine the grades and dockage and shall likewise weigh the grain. The seventh section authorizes the Supervisor to suspend or revoke any such license where, after investigation, he finds that the licensee is incompetent, knowingly or carelessly has graded grain improperly, has short-weighed it, has taken valuable dockage without compensation, or has violated any provision of the Act or of the United States Grain Standards Act.

The eighth section requires every buyer operating an elevator to obtain from the Supervisor a yearly license, the fee for which is to be adjusted by the Supervisor to the capacity of the elevator at not exceeding $1.00 for each 1,000 bushels. The ninth section requires every elevator operator or individual "buying or shipping for profit," who does not pay cash in advance, to file with the Supervisor a sufficient bond, running to the State, to secure payment for all wheat bought on credit. The tenth section requires every buyer operating an elevator to keep a record of the wheat bought at the elevator and to show therein the price paid and grades given, and "the price received and the grades received at the terminal markets;" and further requires him to furnish this information to the Supervisor when requested. The twelfth section makes it unlawful for any person to grade wheat who does not have a license therefor under the Act or under the United States Grain Standards Act. And other sections make every violation of the Act a misdemeanor and charge the Attorney General of the State and its other law officers with the duty of prosecuting such violations.

The Act dispenses with grading where the buying is by sample, by type or by certain designations; but this has no bearing here, for the buying for interstate shipment is all by grade. The Act also dispenses with grading by an inspector licensed thereunder, if

the grain be graded by an inspector licensed under the United States Grain Standards Act; but this is an idle provision, for there are in North Dakota no inspectors licensed under that Act. Such inspectors are found only at terminal markets, and there is no terminal market in North Dakota.

This statement of the provisions of the Act discloses its full purpose and scope; but some of its features, of special importance here, will be noticed again as we proceed.

Buying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in *Lemke* v. *Farmers' Grain Company, supra,* following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309.

Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and to ship it, in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution.[2]

The decisions of this Court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here—one that a state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause;[3] and the other that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose

[2]Crutcher *v.* Kentucky, 141 U. S. 47, 57; Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 21; Oklahoma *v.* Kansas Natural Gas Co., 221 U. S. 229, 260; Buck Stove Co. *v.* Vickers, 226 U. S. 205, 215; Adams Express Co. *v.* New York, 232 U. S. 14, 31; Dahnke-Walker Co. *v.* Bondurant, 257 U. S. 282, 291, 292.

[3]Sherlock *v.* Alling, 93 U. S. 99, 102-104; Kidd *v.* Pearson, 128 U. S. 1, 22, et seq.; Geer *v.* Connecticut, 161 U. S. 519, 532; Sligh *v.* Kirkwood, 237 U. S. 52, 59-61.

with which it was enacted.[4] These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform.

In our opinion the North Dakota Act falls certainly within the second of the two rules just stated. By it that State attempts to exercise a large measure of control over all wheat buying within her limits. About 90 per cent. of the buying is in interstate commerce. Through this buying and the shipping in connection with which it is conducted the wheat which North Dakota produces in excess of local needs—more than 125,000,000 bushels a year—finds a market and is made available for consumption in other States where the local needs greatly exceed the production. Obviously therefore the control of this buying is of concern to the people of other States as well as to those of North Dakota.

Only by disregarding the nature of this business and neglecting important features of the Act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. To conform to recognized commercial practices such buying must be by grade, and it is so conducted. The Act prevents buying by grade, unless the buyer secures from the State a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The Act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for. A failure to comply with this or any other requirement of the Act is made cause for revoking the grading license. It is practically essential that the buyers have and operate elevators as facilities for handling

[4]Crutcher *v.* Kentucky, 141 U. S. 47, 56, 58; Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 27; International Paper Co. *v.* Massachusetts, 246 U. S. 135, 141; Western Union Telegraph Co. *v.* Foster, 247 U. S. 105, 114; Pennsylvania *v.* West Virginia, 262 U. S. 553, 596; Air-Way Corporation *v.* Day, 266 U. S. 71, 81.

and loading the wheat. The Act requires every such buyer to give to the State, if he buys on credit, a bond securing payment for all wheat so purchased; to keep a record of all wheat bought, showing the grade given and price paid at his elevator and the grade fixed and price received at the terminal market; and to furnish such data to the State Supervisor when requested. The Act also intends and declares that the State Supervisor "shall in a general way investigate and supervise the marketing" of the grain with a view of "preventing" various things deemed unjust or fraudulent, including "unreasonable margins of profit" and "confiscation of valuable dockage;" and, to the end that this and other provisions may be made effective, the Act invests him with authority to make and enforce such orders, rules and regulations as may be necessary to carry out all of its provisions.

We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause.

The defendants cite several cases as making for a different conclusion, but we do not so read them. In some the commerce clause was in no way involved, and those in which it was involved give no support to what is attempted in the Act now before us. In *Munn* v. *Illinois*, 94 U. S. 113, 123, 135, the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The Court held such a regulation admissible because of the public character of the elevator and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, the Court had before it a state statute, much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the Court said, p. 470: "The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased." Plainly the case is not in point here. In *Merchants Exchange* v. *Missouri*, 248 U. S. 365,

the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that as applied to grain received from or shipped to points without the State it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn* v. *Illinois*.

The defendants make the contention that we should assume the existence of evils justifying the people of the State in adopting the Act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the States that are affected.

The defendants further contend that the Act is simply an attempt on the part of the State, through inspection regulations, to assist in carrying out the purposes of the United States Grain Standards Act. We think the Act discloses an attempt to do much more. To require that dockage be separated by the buyer and be returned to the producer unless it be distinctly valued and paid for is not inspection. Nor does the federal Act contain or give support to such a requirement. To exclude one from buying by grade unless he secures a grading license for himself or his agent is apart from what usually is comprehended in inspection. Nothing like this is found in the federal Act. On the contrary, it declares that persons licensed to grade under it shall not be interested in any grain elevator or in buying or selling grain, or be in the employ of any owner or operator of a grain elevator. Equally unrelated to inspection are the provisions exacting a bond to pay for all wheat bought on credit; requiring that a record be kept of the price paid in buying at the local elevator and the price received in selling at the terminal market; and authorizing the State Supervisor to investigate and supervise the marketing with a view to preventing unreasonable margins of profit. None of these finds any example in the federal Act; and their presence in the state Act

makes it a very different measure from what it would be without them. Aside from the adoption of the grades established and promulgated under the federal Act, we find little in the state Act to support and much to refute the assertion that it is merely an attempt to carry out the purposes of the federal Act.

For the reasons here given we hold that the Act is a direct regulation of the buying of grain in interstate commerce, and therefore invalid, and that the District Court rightly granted the injunction.

Decree affirmed.

Mr. Justice BRANDEIS dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.